



## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 53

#### [REG-142338-07]

#### RIN 1545-BI33

### Taxes on Taxable Distributions from Donor Advised Funds under Section 4966

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations regarding excise taxes on taxable distributions made by a sponsoring organization from a donor advised fund (DAF), and on the agreement of certain fund managers to the making of such distributions. The proposed regulations would provide guidance regarding DAFs and taxable distributions. The proposed regulations generally would apply to certain organizations, including community foundations and other charitable organizations, that maintain one or more DAFs, and to other persons involved with the DAFs, including donors, donor-advisors, related persons, and certain fund managers.

**DATES:** Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG–142338-07) by following the online instructions for submitting comments. Requests for a public hearing must be submitted as prescribed in the “**Comments and Requests for a Public Hearing**” section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send paper submissions to: CC:PA:01:PR (REG–142338-07), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Ward L. Thomas at (202) 317-5800 (not a toll-free number); concerning submission of comments and requests for a public hearing, contact Vivian Hayes by email at *publichearings@irs.gov* (preferred) or by phone at (202) 317-6901 (not a toll-free number).

## **SUPPLEMENTARY INFORMATION**

### **Background**

#### **I. Overview**

Some charitable organizations (including community foundations) establish accounts to which donors may contribute and thereafter provide nonbinding advice or recommendations with regard to distributions from the account or the investment of assets in the account. Such accounts are commonly referred to as “donor advised funds” or “DAFs.” Sections 1231-1235 of the Pension Protection Act of 2006 (PPA), Public Law 109-280, 120 Stat. 780, 1094-1102 (August 17, 2006), enacted various amendments to the Internal Revenue Code (Code) regarding DAFs. Among these, section 1232 of the PPA amended section 4958 of the Code to add special rules relating to excess benefit transactions with DAFs; section 1231(b) of the PPA added section 4967 to the Code, which imposes an excise tax on prohibited benefits resulting from distributions from DAFs; and section 1231(a) of the PPA added section 4966 of the Code, which imposes excise taxes on taxable distributions made by sponsoring organizations from a DAF, and on the agreement of certain fund managers to the

making of such distributions. This notice of proposed rulemaking contains proposed amendments to 26 CFR Part 53 (Foundation and Similar Excise Taxes) under section 4966 (proposed regulations).

## II. Statutory Provisions

### A. Section 4958

Section 4958 imposes an excise tax on any “excess benefit transaction,” which is defined generally under section 4958(c)(1) as any transaction in which an economic benefit is provided, the value of which exceeds the value of any consideration received, by an applicable tax-exempt organization (including a section 501(c)(3) sponsoring organization of a DAF) directly or indirectly to or for the use of a disqualified person with respect to a transaction.<sup>1</sup> This excise tax under section 4958 is paid by the disqualified person with respect to the transaction. A separate excise tax, paid by organization managers, is imposed on the participation of any organization manager in the transaction, knowing that it is an excess benefit transaction, unless such participation is not willful and is due to reasonable cause.

Section 1232 of the PPA amended section 4958 to provide that, with respect to any transaction that involves a DAF, a disqualified person includes (1) any donor with respect to the DAF, (2) any donor-advisor with respect to the DAF, and (3) any member of the family, or any 35-percent controlled entity of a donor or donor-advisor or member of their families with respect to the DAF, each, a “related person,” and to provide that any grant, loan, compensation, or other similar payment from the DAF to such disqualified person is an excess benefit transaction. For purposes of this special rule for transactions involving DAFs, the excess benefit includes the entire amount of the

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<sup>1</sup> For this purpose, a disqualified person is defined under section 4958(f) as a person who was, at any time during the five-year period ending on the date of the transaction, in a position to exercise substantial influence over the affairs of the organization, and certain related persons, with special rules for DAFs and section 509(a)(3) organizations.

grant, loan, compensation, or other similar payment. The PPA also amended section 4958 to treat as a disqualified person with respect to a transaction involving a sponsoring organization an investment advisor (or a family member or a 35-percent controlled entity of such person).

## B. Section 4966

### 1. DAFs

Section 4966(d)(2)(A) defines a “DAF” generally as a fund or account (1) that is separately identified by reference to contributions of a donor or donors, (2) that is owned and controlled by a sponsoring organization, and (3) with respect to which a donor (or any person appointed or designated by the donor, namely, a donor-advisor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in the fund or account by reason of the donor’s status as a donor.

Section 4966(d)(2)(B)(i) states that a DAF does not include a fund or account that makes distributions only to a single identified organization or governmental entity. Section 4966(d)(2)(B)(ii) states that a DAF does not include a fund or account with respect to which a donor or a donor-advisor provides advice regarding grants to individuals for travel, study, or similar purposes if (1) the donor’s, or the donor-advisor’s, advisory privileges are exercised exclusively in the donor’s or donor-advisor’s capacity as a member of a committee all the members of which are appointed by the sponsoring organization, (2) no combination of donor(s), donor-advisor(s), or persons related to such persons directly or indirectly control the committee, and (3) all grants are awarded on an objective and nondiscriminatory basis pursuant to a procedure approved in advance by the sponsoring organization’s board of directors, and the procedure is designed to ensure that the grants meet the requirements of section 4945(g)(1), (2), or (3).

Section 4966(d)(2)(C) authorizes the Secretary of the Treasury or her delegate (Secretary) to exempt a fund or account from treatment as a DAF if it (1) is advised by a committee not directly or indirectly controlled by the donor or any donor-advisor (and any related parties), or (2) benefits a single identified charitable purpose.

## 2. Sponsoring Organizations

Section 4966(d)(1) defines a “sponsoring organization” as an organization described in section 170(c) (including a foreign organization that otherwise would be described in section 170(c)(2)), other than a private foundation (as defined in section 509(a)) or a governmental entity (as defined in section 170(c)(1)), that maintains one or more DAFs.

## 3. Excise Tax on Taxable Distributions

Section 4966(a)(1) imposes a 20 percent excise tax on each taxable distribution, payable by the sponsoring organization with respect to the DAF. Section 4966(c)(1) defines a “taxable distribution” as including any distribution from a DAF to any natural person. Section 4966(c)(1) also defines a taxable distribution as including a distribution from a DAF to any other person if (1) the distribution is for any purpose other than a purpose specified in section 170(c)(2)(B),<sup>2</sup> or (2) the sponsoring organization does not exercise expenditure responsibility with respect to the distribution in accordance with section 4945(h).

Section 4966(c)(2) provides that a taxable distribution, however, does not include a distribution from a DAF to (1) any organization described in section 170(b)(1)(A) (other than a disqualified supporting organization), (2) the sponsoring organization of such DAF, or (3) any other DAF. Section 4966(d)(4) defines a “disqualified supporting

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<sup>2</sup> Section 170(c)(2)(B) defines charitable contributions to include contributions to certain organizations for the following purposes: religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of the organization's activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.

organization” as (1) a Type III supporting organization that is not functionally integrated and (2) any other supporting organization if the donor or any donor-advisor (and any related parties) with respect to a DAF directly or indirectly controls a supported organization of the supporting organization.

#### 4. Excise Tax on Agreement of Fund Manager

Section 4966(a)(2) imposes a five percent excise tax on the agreement of a fund manager to the making of a taxable distribution knowing that it is a taxable distribution, payable by any fund manager who agreed to the making of the distribution. Section 4966(d)(3) defines a “fund manager” with respect to any sponsoring organization as (1) an officer, director, or trustee of such sponsoring organization (or an individual having powers or responsibilities similar to those of officers, directors, or trustees of the sponsoring organization), and (2) with respect to any act (or failure to act), the employees of the sponsoring organization having authority or responsibility with respect to each act (or failure to act).

Section 4966(b) provides that, if more than one fund manager is liable under section 4966(a)(2), then all such persons are jointly and severally liable with respect to the distribution; however, the maximum amount of tax imposed by section 4966(a)(2) with respect to any one taxable distribution is \$10,000.

#### C. Section 4967

The PPA also added section 4967, which imposes an excise tax on the advice that a donor, donor-advisor, or related person provides regarding a distribution from a DAF that results in such person or any other donor, donor-advisor, or related person receiving, directly or indirectly, a more than incidental benefit. This excise tax is paid by any donor, donor-advisor, or related person who advises the sponsoring organization as to the distribution or who receives the prohibited benefit. A separate excise tax, paid by the fund manager, is imposed on the agreement of any fund manager of the sponsoring

organization to the making of the distribution, knowing that it would confer a prohibited benefit. Section 4967(b) provides that, with respect to any distribution, no tax can be imposed under section 4967 if a tax has been imposed under section 4958.

### III. Administrative Guidance

In December 2006, the Treasury Department and the IRS issued Notice 2006-109, 2006-2 C.B. 1121, to provide interim guidance on certain requirements enacted by the PPA, including those that affect DAFs.<sup>3</sup> Notice 2006-109 also requested comments regarding the notice and suggestions for future guidance.

In February 2007, the Treasury Department and the IRS issued Notice 2007-21, 2007-1 C.B. 611, requesting comments in connection with a study conducted by the Treasury Department and the IRS on the organization and operation of DAFs and supporting organizations, as required by section 1226 of the PPA.

In December 2017, the Treasury Department and the IRS issued Notice 2017-73, 2017-51 I.R.B. 562, describing approaches being considered to address certain issues regarding DAFs and requesting comments on those approaches. In particular, Notice 2017-73 stated, among other things, that the Treasury Department and the IRS are considering developing proposed regulations under section 4967 that would, if finalized, provide that (1) certain distributions from a DAF that pay for the purchase of tickets that enable a donor, donor-advisor, or related person under section 4958(f)(7) to attend or participate in a charity-sponsored event result in a more than incidental benefit to such person under section 4967, and (2) certain distributions from a DAF that the distributee

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<sup>3</sup> For example, section 5.01 of Notice 2006-109 excludes from the definition of a DAF an employer-sponsored disaster relief fund that meets certain requirements. To be excluded, the fund must: (1) serve a single identified charitable purpose, which is to provide relief from one or more qualified disasters within the meaning of section 139(c)(1), (2), or (3); (2) serve a large or indefinite class, i.e., a charitable class; (3) select recipients of grants based on objective determinations of need; (4) select recipients of grants using either an independent selection committee or adequate substitute procedures to ensure that any benefit to the employer is incidental and tenuous; (5) make no payment from the fund to or for the benefit of any director, officer, or trustee of the sponsoring organization of the fund or for the benefit of any member of the fund's selection committee; and (6) maintain adequate records that demonstrate the recipients' needs for the disaster relief assistance.

charity treats as fulfilling a pledge made by a donor, donor-advisor, or related person, do not result in a more than incidental benefit under section 4967 if certain requirements are met.

In response to these three notices, the Treasury Department and the IRS received 118 comments, 74 of which concerned DAFs and taxable distributions.<sup>4</sup> After consideration of the comments received, the Treasury Department and the IRS are proposing these regulations regarding the excise taxes payable by sponsoring organizations of DAFs and fund managers on taxable distributions under section 4966. The major areas of comment relating to section 4966 are discussed in the Explanation of Provisions.

## **Explanation of Provisions**

### 1. Definition of Donor Advised Fund

In accordance with section 4966(d)(2)(A), the proposed regulations would define a DAF generally as a fund or account (1) that is separately identified by reference to contributions of a donor or donors, (2) that is owned and controlled by a sponsoring organization, and (3) with respect to which at least one donor or donor-advisor has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account by reason of the donor's status as a donor. Unless otherwise excepted, a fund or account that meets all three prongs of the definition would be a DAF.

A sponsoring organization is proposed to be defined in accordance with section 4966(d)(1) as any organization that (1) is described in section 170(c) (other than a governmental unit described in section 170(c)(1)), without the requirement under section 170(c)(2)(A) that it be created or organized in the United States or in any

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<sup>4</sup> The Treasury Department and the IRS anticipate that the other comments will be considered in the development of future guidance under other Code sections.



possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States; (2) is not a private foundation; and (3) maintains one or more DAFs.

A. Separate Identification by Reference to Contributions of a Donor or Donors

Section 4966(d)(2)(A)(i) states that a DAF must be separately identified by reference to contributions of a donor or donors. In general, the proposed regulations would provide that a fund or account is separately identified by reference to contributions of a donor or donors if the sponsoring organization maintains a formal record of contributions to the fund or account relating to a donor or donors. A formal record exists regardless of whether the sponsoring organization commingles the assets attributed to the fund or account with other assets of the sponsoring organization, as long as the sponsoring organization tracks contributions of a donor or donors to the fund or account. A contribution would be defined as any gift, bequest, or similar payment or transfer, whether in cash or in-kind, to or for the use of a sponsoring organization.

If the sponsoring organization does not maintain a formal record of contributions to a fund or account, then whether a fund or account is separately identified would be based on all the facts and circumstances.

The proposed regulations would provide that facts and circumstances that are relevant in determining that a fund or account is separately identified by reference to contributions of a donor or donors include: (1) the fund or account balance reflects items such as contributions, dividends, interest, distributions, administrative expenses, and gains and losses (realized or unrealized); (2) the fund or account is named after one or more donors, donor-advisors, or related persons (as defined by proposed §53.4966-1(j));<sup>5</sup> (3) the sponsoring organization refers to the fund or account as a DAF;

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<sup>5</sup> Section 53.4966-1(j) of the proposed regulations defines “related person,” by reference to section 4958(f)(7)(B) and (C), as any family member (as defined in section 4958(f)(4)) or any 35-percent controlled entity (as defined in section 4958(f)(3) with appropriate substituted language).

(4) the sponsoring organization has an agreement or understanding with one or more donors or donor-advisors that such fund or account is a DAF; (5) one or more donors or donor-advisors regularly receive a fund or account statement from the sponsoring organization; and (6) the sponsoring organization generally solicits advice from the donor(s) or donor-advisor(s) before making distributions from the fund or account. The Treasury Department and the IRS request comments on these and any additional factors that would be relevant in determining whether a fund or account is separately identified by reference to contributions of a donor or donors.

Several commenters asked that funds or accounts funded by certain types of organizations, such as public charities, private foundations, or governmental entities, be excluded from the definition of a DAF. The proposed regulations define a donor generally as any person described in section 7701(a)(1) that contributes to a fund or account of a sponsoring organization. However, the proposed regulations would explicitly exclude from the definition of donor (1) any public charity described in section 509(a)(1), (2), or (3) (other than a disqualified supporting organization) and (2) any governmental unit described in section 170(c)(1). A fund or account that is separately identified by reference to contributions solely from either of these types of entities would not be treated as separately identified by reference to contributions from a donor and thus would not be a DAF.<sup>6</sup> Because private foundations and disqualified supporting organizations could use a DAF to circumvent the payout and other requirements that are applicable to those organizations, the proposed regulations would not exclude private foundations or disqualified supporting organizations from the definition of donor.

#### B. Advisory Privileges

Under section 4966(d)(2)(A)(iii), for a fund or account to constitute a DAF, (1) at

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<sup>6</sup> Because public charities and governmental units are not treated as donors, it also follows that if only they have advisory privileges with respect to a fund, the fund would not be a DAF even if there are other donors. See §53.4966-3(e)(4) (*Example 4*) of these proposed regulations.

least one donor or donor-advisor must have, or reasonably expect to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account, and (2) such advisory privileges must arise by reason of (in other words, because of) the donor's status as a donor. The proposed regulations generally would provide that the existence of such advisory privileges depends on the facts and circumstances, including the conduct (and any agreement or understanding) of both the donor(s) or donor-advisor(s) and the sponsoring organization. A donor (or donor-advisor) may have, or reasonably expect to have, advisory privileges even in the absence of the actual provision of advice. Advisory privileges would include those arising from service on an advisory committee. The proposed regulations also would presume that advisory privileges of a donor or donor-advisor arise by reason of the donor's status as a donor, except where specifically provided otherwise.

Commenters recommended that, for advisory privileges to exist, advice must include a specified amount and a named recipient. Commenters also suggested that, in the absence of written evidence, advisory privileges should not be inferred unless there are at least three separate successive occasions where the sponsoring organization accepts the donor's advice. Commenters further requested that a sponsoring organization's proposal to distribute a certain amount to a certain distributee, subject to the donor's approval, be viewed as the donor's exercise of the advisory privilege only if the donor approves the proposal.

The Treasury Department and the IRS believe that the commenters' recommendations would define advisory privileges too narrowly. Instead, the proposed regulations would provide that the presence of any of the following four facts is sufficient to establish that a donor or donor-advisor has advisory privileges by reason of the donor's status as a donor, regardless of whether they are exercised: (1) the sponsoring organization allows a donor or donor-advisor to provide nonbinding recommendations

regarding distributions from, or regarding the investment of assets held in, a fund or account; (2) a written agreement states that a donor or donor-advisor has advisory privileges; (3) a written document or any marketing material of the sponsoring organization made available to a donor or donor-advisor indicates that a donor or donor-advisor may provide advice to the sponsoring organization regarding the distribution or investment of amounts held by a sponsoring organization (for example, a pre-approved list of investment options or distributees that the sponsoring organization provides to a donor or donor-advisor); or (4) the sponsoring organization generally solicits advice from a donor or donor-advisor regarding the distribution or investment of amounts held in a fund or account.

However, the proposed regulations would also provide four special rules relating to advisory privileges. First, if at least one donor or donor-advisor has, or reasonably expects to have, advisory privileges with respect to a fund or account or any portion of a fund or account, then advisory privileges by reason of the donor's status as a donor exist with respect to that fund or account even if there are multiple donors to the fund or account.

Second, there would be special rules for advisory privileges arising from service on an advisory committee, as discussed in section 1.D of this Explanation of Provisions of this preamble.

Third, advice provided solely in a person's capacity as an officer, director, employee (or in a similar capacity) of a sponsoring organization would not by itself give rise to advisory privileges by reason of a donor's status as a donor. However, if, by reason of the person's contribution to a fund or account, an officer, director, or employee of the sponsoring organization is allowed to advise on how to distribute or invest amounts in the fund or account, the person would be considered to have advisory privileges by reason of the donor's status as a donor with respect to that fund or

account.

Lastly, unless the special rule for officers, directors, and employees of a sponsoring organization applies, if a donor to a fund or account is the sole person with advisory privileges with respect to a fund or account, the advisory privileges would be deemed to be by reason of the donor's status as a donor. This bright-line rule would provide clarity and enhance administrability. The Treasury Department and the IRS request comments regarding whether there are additional circumstances in which application of the bright-line rule is not warranted.

Commenters asked that guidance clarify that advisory privileges do not include certain legally enforceable rights of the donor with respect to a contribution. If a restriction is placed on a gift at the time the gift is made and there is no provision for subsequent discretion regarding the restriction, then the restriction should not give rise to advisory privileges. For example, a donor's mere earmarking of a donation (at the time of donation) for a particular fund or program of the recipient charity, without more, does not create an advisory privilege. Whether the terms of a gift agreement create a DAF depends on the restrictions set forth in the agreement. The Treasury Department and the IRS request comments on the circumstances in which a gift agreement or advisory rights retained by a donor could create a DAF.

### C. Donor-Advisor

Consistent with section 4966(d)(2)(A)(iii), the proposed regulations would define donor-advisor as a person appointed or designated by a donor to have advisory privileges regarding the distribution or investment of assets held in a fund or account of a sponsoring organization. If a donor-advisor delegates any of the donor-advisor's advisory privileges to another person, that person also would be a donor-advisor. No particular form of appointment or designation would be necessary under the proposed regulations.

A donor-advisor generally would include a person suggested or recommended by a donor to have advisory privileges if the sponsoring organization provides such privileges. However, this rule would not apply if (1) the donor recommends an investment advisor who is properly viewed as providing services to the sponsoring organization as a whole, rather than providing services to the DAF, as described in this section 1.C of this Explanation of Provisions of this preamble, or (2) the donor recommends a person to serve on a committee of the sponsoring organization that advises as to distributions or investments of amounts in a fund or account if the recommendation is based on objective criteria related to the expertise of the member in the particular field of interest or purpose of the fund or account, the committee consists of three or more individuals and a majority of the committee is not recommended by the donor or donor-advisor, and the recommended person is not a related person with respect to the recommending donor or donor-advisor, as discussed in section 1.D of this Explanation of Provisions of this preamble.

The proposed regulations include three special rules with respect to donor-advisors. First, a person (other than a person or governmental unit excepted from status as a donor) who establishes a fund or account and advises as to the distribution or investment of amounts in that fund or account would be treated as a donor-advisor with respect to that fund or account, regardless of whether the person contributes to the fund or account. For example, if a person establishes a memorial or fundraising fund to which the person does not contribute, but does provide advice regarding distributions from the fund, the person would be considered a donor-advisor. The donors to the fund have implicitly designated the advisor to have advisory privileges.

Second, an investment advisor described in section 4958(f)(8)(B)<sup>7</sup> that manages

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<sup>7</sup> Section 4958(f)(8)(B) defines investment advisor, with respect to any sponsoring organization, as any person (other than an employee of such organization) compensated by the organization for managing the

the investment of, or provides investment advice with respect to, both assets maintained in a DAF and the personal assets of a donor to that DAF (personal investment advisor) would be a donor-advisor with respect to the DAF while serving in that dual capacity, regardless of whether the donor appointed, designated, or recommended the personal investment advisor. However, recognizing that a personal investment advisor may more generally advise the sponsoring organization, the proposed regulations would provide that a personal investment advisor will not be considered a donor-advisor if the personal investment advisor is properly viewed as providing services to the sponsoring organization as a whole, rather than providing services to the DAF. For example, if an investment advisor contracts with a sponsoring organization to provide services to all of its 1,000 DAFs, and the sponsoring organization reasonably charges the investment advisor's fees uniformly to all of those DAFs, the investment advisor would properly be viewed as providing services to the sponsoring organization as a whole.

The Treasury Department and the IRS request comments on additional circumstances that would indicate that a personal investment advisor is properly viewed as providing services to the sponsoring organization as a whole, rather than providing services to the DAF, as well as additional circumstances in which a personal investment advisor should not be considered a donor-advisor.

One commenter suggested that an investment advisor recommended by a donor to the sponsoring organization should not be treated as a donor-advisor if the investment advisor is regulated by State and Federal agencies, because agency oversight makes it unlikely that the investment advisor would manipulate the assets of the DAF for personal gain. The commenter stated that an investment advisor that was considered a donor-advisor could not receive compensation from a DAF because that

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investment of, or providing investment advice with respect to, assets maintained in DAFs owned by the organization.

would be an excess benefit transaction under section 4958(c)(2).

While the commenter believes that it is unlikely that a regulated investment advisor would manipulate the assets of the DAF for personal gain, the Treasury Department and the IRS view the close relationship between a donor and his or her personal investment advisor as giving the donor influence over investment decisions with respect to assets held in the DAF comparable to that of a donor-advisor.

Moreover, the Treasury Department and the IRS are concerned about potential conflicts of interest. Specifically, sponsoring organizations may allow the appointment of a donor's personal investment advisor as an advisor regarding the investment of DAF funds in order to encourage investment advisors to promote their clients' giving through a DAF, rather than directly to a public charity (other than the sponsoring organization). In fact, a counterincentive may be created for both donors and their personal investment advisors to not advise distributions out of their DAFs to operating charities. Another significant concern is that a more than incidental benefit may occur if the investment advisor charges the donor a reduced fee for managing the donor's personal assets because the investment advisor also manages the assets the donor contributed to the DAF.

The Treasury Department and the IRS agree that a personal investment advisor that is considered a donor-advisor would be subject to the excess benefit transaction rules of section 4958(c)(2) if he or she received a grant, loan, compensation, or similar payment from the DAF.

Third, advisory committee members recommended by a donor and appointed by the sponsoring organization would be donor-advisors, except as discussed in section 1.D of this Explanation of Provisions of this preamble.

#### D. Advisory Committees

The Treasury Department and the IRS generally would regard service on a



committee of a sponsoring organization that advises as to distributions from or investments of assets of a fund or account as a form of advisory privilege with respect to that fund or account in determining whether the fund is a DAF, even though the sponsoring organization controls the selection of committee members consistent with its ownership and control of the fund or account in accordance with section 4966(d)(2)(A)(ii). Recognizing that a fund or account, including a multiple-donor fund, as discussed in section 1.E of this Explanation of Provisions of this preamble, may sometimes be advised by an advisory committee that includes one or more donors, donor-advisors, related persons, or persons recommended by donors or donor-advisors to serve on the advisory committee, the proposed regulations would provide two special rules relating to advisory privileges arising from service on an advisory committee. Under these two special rules, a fund or account could be advised by a committee that may include one or more donors, donor-advisors, related persons, or persons recommended by donors or donor-advisors, without being a DAF.

First, when a sponsoring organization appoints a donor, donor-advisor, or related person to serve on an advisory committee, the donor, donor-advisor, or related person generally would have advisory privileges by reason of the donor's status as a donor. However, the proposed regulations would provide that a sponsoring organization's appointment of a donor, donor-advisor, or related person to be on a committee that advises as to distributions or investments of amounts in the fund or account will not be deemed to result in advisory privileges by reason of the donor's status as a donor if (1) the appointment is based on objective criteria related to the expertise of the appointee in the particular field of interest or purpose of the fund or account; (2) the committee consists of three or more individuals, not more than one-third of whom are related persons with respect to any of the others; and (3) the appointee is not a significant contributor to the fund or account, taking into account contributions by related persons

with respect to the appointee,<sup>8</sup> at the time of appointment. If an appointee or related person is not a significant contributor to a fund or account at the time of appointment but becomes one shortly afterwards, the IRS may find that the person has advisory privileges based on the facts and circumstances. The Treasury Department and the IRS request comments on what constitutes a significant contributor for purposes of this exception.

Second, when a donor (or donor-advisor) recommends someone to serve on an advisory committee advising as to the distribution or investment of funds in the fund or account, that person would be considered a donor-advisor if the sponsoring organization appoints the recommended person to serve on the advisory committee. However, the proposed regulations would allow a donor (or donor-advisor) to recommend a person to serve as a member of an advisory committee of the sponsoring organization for the fund or account and not be considered to be a donor-advisor if (1) the recommendation is based on objective criteria related to the expertise of the member in the particular field of interest or purpose of the fund or account; (2) the committee consists of three or more individuals, and a majority of the committee is not recommended by the donor or donor-advisor; and (3) the recommended person is not a related person with respect to the recommending donor or donor-advisor.

The Treasury Department and the IRS request comments on the proposed advisory committee exceptions, including additional circumstances in which advisory privileges arising from advisory committees should not result in the creation of a DAF.

#### E. Multiple-Donor Funds or Accounts

Several commenters suggested excepting a fund or account to which multiple unrelated donors contributed from the definition of DAF. Commenters expressed

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<sup>8</sup> For example, if a donor is a significant contributor, a family member who is appointed to the committee also is considered a significant contributor, regardless of whether the family member actually contributed to the fund.

concern that failing to provide an exception would affect charitable giving practices encouraged by alumni organizations or professional associations, as well as discourage the use of funds or accounts to incubate potential public charities. One commenter suggested that imposing various conditions, including that the fund or account have at least three unrelated donors; that the donations be aggregated into a single consolidated account balance; that no written or oral understanding exists that donors have advisory privileges corresponding to the amounts they donated to the fund or account; and that no single donor or group of related donors gave more than 35 percent of all donations, would prevent the vast majority of potential abuses of multiple-donor fund status while allowing most giving circles and giving pools maintained at public charities to avoid DAF status. Other commenters suggested that, without various safeguards, an exception for multiple-donor funds or accounts may permit abuses.

The Treasury Department and the IRS anticipate that, in most circumstances, a multiple-donor fund or account would be separately identified by reference to contributions of a specific donor or donors. However, even if separately identified, a multiple-donor fund or account would not be a DAF if no donor or donor-advisor has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in the fund or account by reason of the donor's status as a donor. Furthermore, section 4966(d)(2)(B) and the proposed regulations include several special rules that may permit a multiple-donor fund or account to be excepted from definition as a DAF even if it doesn't meet one of the exceptions discussed in section 2 of this Explanation of Provisions of this preamble (such as funds or accounts making distributions only to a single identified organization or funds or accounts making certain grants to individuals for travel, study, or other similar purposes).

First, as indicated in section 1.A. of this Explanation of Provisions of this preamble, the proposed regulations would exclude certain entities from the definition of

“donor.” Specifically, the proposed regulations would define donor to exclude any public charity described in section 509(a)(1), (2), or (3) (other than a disqualified supporting organization) and (2) any governmental unit described in section 170(c)(1). If a fund or account has multiple donors but only a public charity or governmental unit has the right to exercise advisory privileges, then no donor, as defined by the proposed regulations, would have advisory privileges with respect to the distribution or investment of amounts held in the fund or account by reason of the donor's status as a donor. Thus, the fund or account would not be a DAF.

Second, as discussed in section 1.D of this Explanation of Provisions of this preamble, the proposed regulations would provide two special rules relating to advisory privileges arising from service on an advisory committee. These two rules would allow certain multiple-donor funds or accounts to be advised by a committee that may include one or more donors, donor-advisors, related persons, or persons recommended by donors or donor-advisors, without being a DAF.

The Treasury Department and the IRS request comments on whether and in what circumstances additional types of exceptions are warranted to allow multiple-donor funds or accounts to be excluded from the definition of DAF. The Treasury Department and the IRS are particularly interested in comments addressing how any exception for multiple-donor funds or accounts can be crafted to prevent circumvention of the provisions of section 4966 while still being administrable for both sponsoring organizations and the IRS.

## 2. Exceptions to the Definition of Donor Advised Fund

Consistent with section 4966(d)(2)(B), the proposed regulations generally would provide that a DAF does not include any fund or account that makes (1) distributions only to a single identified organization, or (2) certain grants to individuals for travel, study, or other similar purposes. These exceptions are discussed in sections 2.A. and

2.B. of this Explanation of Provisions of this preamble.

In addition, under section 4966(d)(2)(C), the Secretary has discretionary authority to exempt a fund or account from the definition of DAF if the fund or account is advised by a committee not directly or indirectly controlled by the donor or donor-advisor (and any related parties<sup>9</sup>) or if the fund or account benefits a single identified charitable purpose. The proposed regulations would provide two exceptions to the definition of DAF under this discretionary authority: (1) an exception for disaster relief funds consistent with the exception originally set forth in Notice 2006-109, with some modifications, and (2) an exception for certain scholarship funds whose committee is nominated by a section 501(c)(4) organization with a broad-based membership.

The Treasury Department and the IRS request comments on whether other funds should be excepted from the definition of DAF using the authority under section 4966(d)(2)(C) and what, if any, restrictions should apply to ensure that the intent of section 4966 is achieved.

A. Single Identified Organization Exception

Section 4966(d)(2)(B)(i) states that a fund or account that makes distributions only to a single identified organization or governmental entity is not a DAF. Several commenters suggested that a single identified organization should include an organization that is not described in section 501(c)(3), including a for-profit business and an organization described in section 501(c)(4), so long as the distributions to the organization or business are made for a charitable purpose described in section 170(c)(2)(B). The proposed regulations would provide that a fund or account will not be

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<sup>9</sup> Section 4966 does not define the term “related parties” and otherwise uses the term “persons.” Furthermore, another provision applicable to donor advised funds, section 4958, defines certain “persons” in connection with a DAF for purposes of excess benefit transactions. For consistency and administrability across the provisions applicable to DAFs, the proposed regulations use the term “related persons” rather than “related parties” and define “related persons” as those persons described in section 4958(f)(7)(B) and (C).

considered a DAF if, along with meeting the other requirements discussed in this section 2.A, it is established to make (and actually does make) distributions solely to a single identified organization that is either: (1) an organization described in sections 170(c)(2) and 509(a)(1), (2), or (3) (other than a disqualified supporting organization), or (2) a governmental entity described in section 170(c)(1) if the distribution is made exclusively for public purposes. The Treasury Department and the IRS are concerned that expanding the exception to include other types of organizations may allow circumvention of other tax provisions, such as the private foundation and charitable contribution deduction rules. Thus, the exception would not apply if the single identified organization is a private foundation, disqualified supporting organization, foreign organization, or non-charitable organization.

If the single identified organization loses its exempt status or ceases operating, the proposed regulations would provide rules similar to the rules found in §1.509(a)-4(d)(4)(i)(a) (allowing a supporting organization to substitute a new supported organization). A sponsoring organization would be permitted to substitute another single identified organization if the substitution is conditioned upon the occurrence of a loss of exemption, substantial failure or abandonment of operations, or a dissolution or reorganization that results in the named single identified organization ceasing to exist, and the event is beyond the direct or indirect control of donor(s), donor-advisor(s), or related persons.

Commenters suggested that the exception for a fund or account that makes distributions to a single identified organization should encompass distributions made to support that organization's activities and that a fund restricted to a specific charitable project should be considered a fund or account that makes distributions to a single identified organization. Commenters suggested that a fund should therefore be able to support the programs or activities of a single identified organization by making

distributions to individuals directly (as long as the distributions are limited to those within the charitable class served by that single identified organization), or by receiving, holding and disbursing funds for a specific project or program conducted by the single identified organization, including making distributions to third parties for goods, services, and incidental grant-making limited to a particular project or program. For example, commenters suggested that the exception should apply to a scholarship fund that a donor establishes at a university and that provides scholarships and other grants solely to students at that university whom the donor has a role in selecting.

Under the proposed regulations, the sponsoring organization would be permitted to make distributions to the single identified organization for the single identified organization's activities (and only activities other than administering DAFs or grant-making) and, thus, to make distributions to fund a specific charitable project (other than administering DAFs or grant making) of the single identified organization. However, the sponsoring organization could not make distributions directly to third parties on behalf of the single identified organization, such as by making distributions to third parties for goods, services, or incidental grant-making for a particular project or program, because the statute requires that the fund or account make distributions only to the single identified organization.

Because a fund or account that falls within the single identified organization exception is not subject to the rules applicable to DAFs, the proposed regulations would provide that distributions to the single identified organization may not be used to administer DAFs or to make grants. In addition, the proposed regulations would provide that a fund or account will not be treated as making distributions only to a single identified organization if (1) a donor, donor-advisor, or related person has or reasonably expects to have, the ability to advise regarding distributions from the single identified organization to other individuals or entities, or (2) a distribution from the fund or account

will provide, directly or indirectly, a more than incidental benefit (within the meaning of section 4967) to a donor, donor-advisor, or related person with respect to the fund or account. Thus, for example, if a donor establishes a fund to make distributions only to a single public charity, and the donor is on the Board of the public charity, then the fund would not be able to meet this exception because the donor has the ability to advise some or all of the distributions from the public charity to other entities.

Recognizing that a sponsoring organization may lack direct knowledge regarding the activities of the donor, donor-advisor, or related person with regard to the single identified organization, however, the proposed regulations would allow a sponsoring organization to rely on a certification from the donor that (1) no donor, donor-advisor, or related person has or reasonably expects to have, the ability to advise regarding distributions from the single identified organization to other individuals or entities, and (2) no distribution from the fund or account will provide, directly or indirectly, a more than incidental benefit (within the meaning of section 4967) to a donor, donor-advisor, or related person with respect to the fund or account, as long as the sponsoring organization lacks knowledge to the contrary.

The Treasury Department and the IRS request comments on whether additional guidance is needed on situations in which a fund or account is established at a public charity and the written agreement establishing the fund or account provides that the contributed amounts can only be used to support programs within that public charity, but the donor retains advisory privileges with respect to the public charity's use or investment of some or all of the funds. Section 4966(c)(2)(B) excepts from the definition of "taxable distribution" any distribution from a DAF to the sponsoring organization of the DAF; accordingly, any fund or account established at a public charity that is used to support operating programs of the public charity (rather than to make distributions to third parties) would not have any taxable distributions, if the fund or account were a



DAF. For example, a donor who established a fund or account at a university could advise that contributions previously made to the fund or account be distributed to the university's scholarship program. However, if the donor were to want to have a role in advising on the selection of scholarship recipients then, to avoid a taxable distribution, the donor's involvement would need to meet the exception provided in section 4966(d)(2)(B)(ii) (discussed in section 2.B. of this Explanation of Provisions of this preamble).

#### B. Statutory Scholarship Exception

Under section 4966(d)(2)(B)(ii) the term "donor advised fund" does not include a fund or account that exclusively makes grants for travel, study, or other similar purposes, provided certain requirements are met. Consistent with section 4966(d)(2)(B)(ii), the proposed regulations would provide that, under this exception from the definition of a DAF, a donor or donor-advisor may provide advice as to which individuals receive grants for travel, study, or other similar purposes from a fund or account if (1) the person provides the advice exclusively in the person's capacity as a member of the selection committee; (2) all the members of the selection committee are appointed by the sponsoring organization; (3) no combination of donor(s), donor-advisor(s), or related persons controls, directly or indirectly, the committee; and (4) all grants from the fund or account are awarded on an objective and nondiscriminatory basis pursuant to a written procedure approved in advance by the board of directors of the sponsoring organization and the procedure is designed to ensure that all grants meet the requirements of paragraph (1), (2), or (3) of section 4945(g) and the regulations thereunder. The requirements in the regulations under section 4945(g) include the requirements that the group from which grantees are selected will ordinarily be sufficiently large to constitute a charitable class; that the members of the selection committee will not be in a position to derive a private benefit if certain potential grantees

are selected over others; and that the sponsoring organization will maintain adequate records regarding the identification and selection of individual grantees. If a fund or account satisfies the requirements of the exception, a sponsoring organization may award a scholarship from the fund or account to an individual without subjecting the sponsoring organization or its fund managers to excise taxes under section 4966.

The proposed regulations would provide that whether a combination of donor(s), donor-advisor(s), or related persons controls, directly or indirectly, the selection committee is determined by looking to the substance, rather than the form, of any arrangement. Direct control would exist if donor(s), donor-advisor(s), or related persons, either alone or together, (1) can require the committee to take or refrain from taking any action; (2) control 50 percent or more of the total voting power of the committee; or (3) have the right to exercise veto power over the committee's decisions. Whether indirect control exists is determined by the facts and circumstances, including the nature of any relationships among members of the selection committee and with any donor, donor-advisor, or related person. For example, a committee would be "indirectly controlled" by a combination of donor(s), donor-advisor(s), or related persons if a majority of the selection committee is currently engaged by the donor, donor-advisor, or any related person in any employment or fiduciary capacity, whether as an employee or independent contractor, or recommended by a donor or donor-advisor and appointed to the selection committee based on other than objective criteria regarding the person's expertise, or a combination thereof.

One commenter recommended that a sponsoring organization be permitted to set reasonable uniform procedures for appointing members to selection committees, taking into account the size of the sponsoring organization, the number of grants from the scholarship fund, and other relevant facts and circumstances, rather than requiring action by the entire board. The proposed regulations would provide that, in appointing

the members of the selection committee, a sponsoring organization may act through its board of directors, trustees, or other governing body, a committee appointed by its governing body, or an appropriate officer of the sponsoring organization.

The Treasury Department and the IRS are concerned that some employers may seek to use this statutory scholarship exception to grant employer-related scholarships in a manner that would otherwise not be considered a scholarship or fellowship grant subject to the provisions of section 117(a), or that would otherwise be a taxable expenditure under section 4945, by having a sponsoring organization administer their scholarship programs. See, e.g., Rev. Proc. 76-47, 1976-2 C.B. 670, and Rev. Proc. 80-39, 1980-2 C.B. 772. The Treasury Department and the IRS request comments on whether additional guidance is needed to prevent avoidance of the employer-related scholarship rules or to address any potential private benefit arising from employer-related scholarship programs.

C. Exception for Certain Scholarship Funds Established by Certain Section 501(c)(4) Organizations

Several commenters asked for guidance relating to a scholarship fund of a sponsoring organization that receives contributions from a tax-exempt membership organization, such as a section 501(c)(4) social welfare organization. The commenters stated that, for example, Rotary Club scholarship funds are often established at community foundations and that these scholarship funds do not fit within the statutory scholarship committee exception provided by section 4966(d)(2)(B)(ii) because members of the section 501(c)(4) organization who may be donors to the fund comprise a majority of the scholarship selection committee. These commenters asked that the proposed regulations provide an additional exception allowing members of a section 501(c)(4) organization who are otherwise unrelated to one another to control the scholarship selection committee, particularly since it is difficult to find non-members

willing to serve on the committee. The commenters noted that requiring Rotary Clubs to form a section 501(c)(3) organization to make distributions for Rotary scholarships would be an inefficient use of charitable resources and that sponsoring organizations can provide expertise on objective and charitable standards for selecting scholarship recipients.

The proposed regulations would provide an exception to the definition of DAF for a fund or account established by a broad-based membership organization described in section 501(c)(4) if six conditions are met. The conditions would substantially mirror the conditions in the statutory scholarship exception, except that donors may control the committee.

First, the fund or account's single identified charitable purpose must be to make grants to individuals for scholarships described in section 4945(g)(1).

Second, the selection of recipients of scholarships from the fund or account must be made by a selection committee the members of which are nominated by the section 501(c)(4) organization and approved in writing by the sponsoring organization. This requirement would allow the section 501(c)(4) organization to have input on the members of the selection committee, but would leave the final decision to the sponsoring organization that owns and controls the assets of the fund or account.

Third, the fund or account must serve a charitable class.

Fourth, like the statutory scholarship exception, recipients of grants from the fund or account must be selected on an objective and nondiscriminatory basis, pursuant to a written procedure, approved in advance by the sponsoring organization's board of directors, that is designed to ensure that all the grants meet the requirements of section 4945(g)(1) and the regulations under section 4945 (other than advance approval by the IRS).

Fifth, no distribution may be made from the fund or account to (1) any director,

officer, or trustee of the sponsoring organization of the fund, (2) any member of the fund's selection committee, (3) any member, honorary member, or employee of the section 501(c)(4) organization, or (4) any person related to anyone described in (1), (2), or (3).

Finally, the fund or account must maintain adequate records that demonstrate the recipients were selected on an objective and nondiscriminatory basis.

The Treasury Department and the IRS are concerned that not requiring the section 501(c)(4) organization to have a broad-based membership could allow a small group of persons to set up a section 501(c)(4) organization and use a fund or account at a sponsoring organization to grant scholarships to their selected recipients with tax-deductible contributions, circumventing the DAF rules. Given this concern, the Treasury Department and the IRS request comments on how to identify a broad-based membership organization described in section 501(c)(4), including factors such as the organization's number of members, criteria for selecting members, membership rights, and geographic coverage.

The Treasury Department and the IRS also request comments on whether and under what circumstances other organizations, such as section 501(c)(5) and 501(c)(6) organizations, use similar types of committee-advised scholarship funds and whether the exception should be extended to those organizations, recognizing that section 501(c)(4) organizations are formed to promote social welfare whereas section 501(c)(5) and section 501(c)(6) organizations are formed to further different purposes.

#### D. Disaster Relief Exception

Several commenters asked that the proposed regulations provide, consistent with Notice 2006-109, that an employer-sponsored disaster relief fund is not a DAF. Commenters also recommended that the exception be extended to disaster relief funds outside of the employment context and that the exception be extended to emergency

hardship situations outside of the disaster relief context.

Since the determination of the existence of a qualified disaster under section 139 is not controlled by the sponsoring organization or the fund or account's advisory committee, the proposed regulations would exempt a non-employment based disaster relief fund. Thus, the proposed regulations would provide that both an employer-sponsored disaster relief fund and a disaster relief fund outside of the employment context are not DAFs, as long as the requirements of section 139 are met. In contrast, since the determination of the existence of an emergency hardship is controlled by the sponsoring organization or the fund or account's advisory committee, the proposed regulations would not extend the exception to emergency hardship funds.

To meet the disaster relief exception in the proposed regulations, six conditions must be met. The conditions substantially mirror the provisions in Notice 2006-109 (and the special rules generally for charitable assistance in qualified disasters) and the provisions of the statutory scholarship exception and the exception for certain scholarship funds established by section 501(c)(4) organizations.

First, the fund or account's single identified charitable purpose must be to provide relief from one or more qualified disasters within the meaning of section 139(c)(1), (2), or (3).

Second, the fund or account must serve a charitable class.

Third, recipients of grants from the fund or account must be made by a selection committee not controlled by donors, donor-advisors, or related persons and for which all the members are appointed by the sponsoring organization. Alternatively, if the fund or account gives preference or priority to employees (or their family members) of an employer to receive grants, the majority of the selection committee must consist of persons who are not in a position to exercise substantial influence over the affairs of the employer (or adequate substitute procedures exist to ensure that any benefit to the

employer is incidental and tenuous).

Fourth, the selection committee must select grant recipients based on objective and nondiscriminatory determinations of need pursuant to a written procedure approved in advance by the board of directors of the sponsoring organization.

Fifth, no distribution from the fund or account may result in more than an incidental benefit to (1) any director, officer, or trustee of the sponsoring organization of the fund or account; (2) any member of the fund or account's selection committee; or (3) any person related to a director, officer, or trustee of the sponsoring organization or a member of the selection committee.

Lastly, the sponsoring organization must maintain records that (1) demonstrate the need of the recipients for the disaster relief assistance provided, and (2) satisfy the requirements of section 6033(b)(14).<sup>10</sup>

### 3. Taxable Distributions

Section 4966(c)(1) defines a taxable distribution as any distribution from a DAF to (1) any natural person, or (2) any other person unless the distribution is for a purpose specified in section 170(c)(2)(B) and the sponsoring organization exercises expenditure responsibility with respect to the distribution in accordance with section 4945(h).

Section 4966(c)(2) excepts from the term "taxable distribution" any distribution from a DAF to (1) any organization described in section 170(b)(1)(A) (other than a disqualified supporting organization), (2) the sponsoring organization of the DAF, or (3) any other DAF. The Treasury Department and the IRS expect that most distributions from DAFs are to organizations described in section 170(b)(1)(A) (but not to disqualified supporting organizations) and thus are not taxable distributions.

The proposed regulations incorporate the statutory definition of taxable

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<sup>10</sup> Section 6033(b)(14), added in 2008, requires every section 501(c)(3) organization required to file an annual information return to furnish annually such information as the Secretary may require with respect to disaster relief activities.

distribution. In addition, the proposed regulations would set forth an anti-abuse rule providing that, if a series of distributions through intermediary distributees undertaken pursuant to a plan achieves a result that is inconsistent with the purposes of section 4966, the distributions are treated as a single distribution for purposes of section 4966. For example, if a donor advises a distribution, that the sponsoring organization subsequently makes, from a DAF to Charity X and the donor or the sponsoring organization arranges for Charity X to use the funds to make distributions to an individual recommended by the donor, the distribution would be a taxable distribution from the sponsoring organization to an individual.

Several commenters recommended that the term “distribution” be narrowly defined to include only a gratuitous transfer. These commenters requested that a purchase of goods or services by a sponsoring organization using funds from a DAF for charitable activity or fundraising would not be considered a distribution. One commenter asked that the term “distribution” be defined the same as the term “grant” in section 4945 and that it not include payments from a sponsoring organization using funds from a DAF to vendors for goods or services or employee compensation.

The proposed regulations do not adopt these suggestions and would construe the term “distribution” broadly. In particular, the proposed regulations would provide that the term “distribution” generally means any grant, payment, disbursement, or transfer, whether in cash or in kind, from a DAF. In addition, the proposed regulations would provide that any use of DAF assets that results in a more than incidental benefit to a donor, donor-advisor, or related person is a deemed distribution and thus generally would be a taxable distribution. The Treasury Department and the IRS note that distributions resulting in a more than incidental benefit to a donor, donor-advisor, or related person may also result in tax under section 4967. See Notice 2017-73, 2017-51 I.R.B. 562.



However, the proposed regulations would provide that (1) investments and (2) reasonable investment and grant-related fees generally are not distributions under this definition (unless they result in a more than incidental benefit as noted above).

Investments generally would not be treated as distributions under the proposed regulations because they typically merely reflect a change from one form of property to another. The Treasury Department and the IRS would consider investments for this purpose as including both debt and equity instruments held for the purpose of obtaining income or funds, including investments made partly for charitable purposes as described in Notice 2015-62, 2015-39 I.R.B. 411. However, an investment would not, for example, include a zero-interest loan, as there is no purpose of, or provision for, obtaining income or funds from the zero-interest loan. The Treasury Department and the IRS anticipate that a zero-interest loan would be a distribution under the proposed regulations and, unless made to a section 170(b)(1)(A) organization other than a disqualified supporting organization, would require expenditure responsibility by the sponsoring organization in order not to be a taxable distribution. The Treasury Department and the IRS request comments on how to further distinguish distributions from investments.

Reasonable investment and grant-related fees paid from DAF assets generally would not be considered distributions; however, an unreasonable grant-related or investment fee would be a deemed distribution and, thus, would be a taxable distribution. The Treasury Department and the IRS expect that whether a fee is reasonable would be determined by all the facts and circumstances. For example, an expense charged uniformly or ratably across all DAFs generally would be considered a reasonable fee and not a distribution. In addition, an expense charged solely to a particular DAF (such as an expense arising from an expenditure responsibility grant from the fund) may be reasonable, depending on the facts and circumstances.

However, the proposed regulations would provide that an expense charged solely to a particular DAF that is paid, directly or indirectly, to a donor, donor-advisor, or related person with respect to the DAF, is a deemed distribution subject to sections 4966, 4958, and/or 4967.

A. Distributions to Section 170(b)(1)(A) Organizations

Section 4966(c)(2)(A) provides that a distribution to any organization described in section 170(b)(1)(A) (other than a disqualified supporting organization) is not a taxable distribution. Similar to existing guidance under §53.4945-5(a)(4), the proposed regulations would provide several categories of organizations treated as described in section 170(b)(1)(A) for purposes of section 4966(c)(2)(A).

First, an organization would be considered an organization described in section 170(b)(1)(A) if it is described in both sections 170(b)(1)(A) and 170(c)(2) (other than a disqualified supporting organization), without the requirement under section 170(c)(2)(A) that it be created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States. Thus, for example, a taxable organization that operates a for-profit school would not be treated as described in section 170(b)(1)(A) because the organization would not be described in section 170(c)(2).

Second, an organization that is a governmental unit described in section 170(b)(1)(A)(v) and 170(c)(1) (or an agency or instrumentality thereof, including an organization described in section 511(a)(2)(B)) would be considered an organization described in section 170(b)(1)(A), as long as the distribution to it is made for exclusively public purposes.

Third, a foreign government (or an agency or instrumentality thereof), or an international organization designated as such by Executive Order under 22 U.S.C. 288 would be treated as an organization described in section 170(b)(1)(A), as long as the

distribution to it is made exclusively for purposes described in section 170(c)(2)(B).

One commenter asked that guidance expressly provide that DAFs may make grants to foreign organizations based on the same equivalency determinations that private foundations use for purposes of determining whether a foreign organization is the equivalent of a domestic public charity. The proposed regulations would adopt this suggestion. Consistent with Rev. Proc. 2017-53, 2017–40 I.R.B. 263 (providing guidelines for equivalency determinations by, among others, sponsoring organizations of DAFs), the proposed regulations would provide that, prior to the distribution, a sponsoring organization may make a good faith determination that a foreign organization is described in sections 501(c)(3) and 170(b)(1)(A) (other than a disqualified supporting organization) using procedures similar to those procedures permitted for private foundation grantors under §53.4945-5(a)(5). Those procedures provide that a determination will ordinarily be a good faith determination if it is based on current written advice from a qualified practitioner and the organization reasonably relied in good faith on the written advice. If a sponsoring organization makes a good faith determination that a foreign organization is described in sections 501(c)(3) and 170(b)(1)(A) (other than a disqualified supporting organization), the sponsoring organization would not need to exercise expenditure responsibility with respect to a distribution to that organization.

#### B. Disqualified Supporting Organizations

Section 4966(d)(4)(A)(i) defines any Type III non-functionally integrated supporting organization as a disqualified supporting organization with respect to any distribution.<sup>11</sup> Section 4966(d)(4)(A)(ii)(I) disqualifies any other type of supporting

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<sup>11</sup> In defining a disqualified supporting organization, the proposed regulations use the definitions of supporting organization types under the section 509(a)(3) regulations.

organization if the donor or any donor-advisor (and any related parties)<sup>12</sup> directly or indirectly controls a supported organization (as defined in section 509(f)(3)) of the supporting organization. The Treasury Department and the IRS request comments on whether other entities should be included in the definition of disqualified supporting organization, using the authority under section 4966(d)(4)(A)(ii)(II) to designate other supporting organizations as disqualified, because a distribution to such organization is inappropriate if expenditure responsibility is not exercised to ensure the distribution is for a purpose specified in section 170(c)(2)(B).

C. Distributions to Non-Section 170(b)(1)(A) Organizations or to Disqualified Supporting Organizations

Under section 4966(c)(1)(B), a distribution to any entity not described in section 170(b)(1)(A), or to a disqualified supporting organization, will be a taxable distribution unless (1) the distribution is for a purpose specified in section 170(c)(2)(B) (generally, is for a charitable purpose), and (2) the sponsoring organization exercises expenditure responsibility with respect to the distribution in accordance with section 4945(h).

i. Non-Charitable Purposes

The proposed regulations would provide that purposes described in section 170(c)(2)(B) are treated as such whether or not carried out by an organization described in section 170(c). However, a distribution to be used for an activity prohibited under section 501(c)(3), or for an activity that would cause loss of tax exemption if it were a substantial part of a section 501(c)(3) organization's total activities, is not for a purpose specified in section 170(c)(2)(B). Thus, a distribution used for political campaign intervention activity or attempts to influence legislation would be considered to be for a

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<sup>12</sup> See note 7.

purpose not specified in section 170(c)(2)(B)<sup>13</sup> and, thus, if made directly or to an entity not described in section 170(b)(1)(A), or to a disqualified supporting organization, would be a taxable distribution.

The proposed regulations would also include a requirement, similar to the requirement in §53.4945-6(c)(2), that a grant to an organization (other than one that is described in section 501(c)(3) and not in section 509(a)(4)) will not be considered to be for a purpose specified in section 170(c)(2)(B) unless the grantee agrees to separately account for grant funds (either by separately accounting for grant funds on its books or by segregating the grant funds). (Such grant funds must also be used for charitable purposes, consistent with the expenditure responsibility rules discussed in section 3.C.ii of this Explanation of Provisions of this preamble.)

ii. Expenditure Responsibility

Section 4966(c)(1)(B)(ii) requires sponsoring organizations to exercise expenditure responsibility in accordance with section 4945(h) for certain distributions. Thus, the proposed regulations cross-reference the section 4945(h) expenditure responsibility regulations applicable to private foundations, with one modification. In lieu of the requirements found in §53.4945-5(b)(3)(iv)(c) and (b)(4)(iv)(c) (pertaining to the recipient's permitted use of the funds), the distributee would be required to agree not to: (1) make a grant to an organization that does not comply with the expenditure responsibility requirements, (2) make a grant to a natural person, or (3) make a grant, loan, compensation, or other similar payment (as described in section 4958(c)(2)) to a donor, donor-advisor, or related person with respect to the DAF from which the distribution that is the subject of the agreement is made. For purposes of these rules pertaining to the secondary use of distributions, the definition of "grant" set forth in

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<sup>13</sup> The Treasury Department and the IRS also note that allowing distributions from a DAF for lobbying or political campaign activity would contravene the charitable contribution deduction rules and private foundation restrictions.

§53.4945-4(a)(2) would apply, rather than the broader definition of “distribution” found in proposed §53.4966-1(e). If the definition of “distribution” found in proposed §53.4966-1(e) applied, distributees would be required to exercise expenditure responsibility in the purchase of goods and services, which is not intended under the proposed rule.

The Treasury Department and the IRS request comments on this modification to the expenditure responsibility rules and whether additional guidance is needed.

#### 4. Taxes on Taxable Distributions

Consistent with section 4966(a)(1), the proposed regulations would provide that an excise tax equal to 20 percent of the amount of the taxable distribution is imposed on each taxable distribution from a DAF. This excise tax is paid by the sponsoring organization of the DAF. The provisions of proposed §53.4966-2 are generally similar to those of §53.4958-1 and other chapter 42 excise tax regulations relating to the calculation of the tax on the organization and its managers.

In addition, consistent with section 4966(a)(2), the proposed regulations would provide that each fund manager who knowingly agrees to the making of a taxable distribution is liable for an excise tax equal to five percent of the amount of the taxable distribution, up to a maximum of \$10,000 for any one taxable distribution. If more than one fund manager is liable for the excise tax, all such persons would be jointly and severally liable for that tax. The proposed regulations, consistent with section 4966(d)(3), would define a fund manager as (1) an officer, director, or trustee of the sponsoring organization, or any individual with authority or responsibility similar to that exercised by an officer, director, or trustee of an organization, regardless of title, and (2) with respect to any act (or failure to act), the employee having authority or responsibility (either individually or as a member of a collective body) for such act (or failure to act). An example of a failure to act by a fund manager resulting in a taxable distribution would be a failure to exercise expenditure responsibility if required.

The proposed regulations would provide that the agreement of any fund manager to the making of a taxable distribution consists of any manifestation of approval of the distribution that is sufficient to constitute an exercise of the fund manager's authority to approve, or authority to exercise discretion in recommending approval of, the making of the distribution by the sponsoring organization, whether or not it is the final or decisive act on behalf of the sponsoring organization.

A fund manager generally would be considered to have agreed to the making of a distribution with knowledge that it is a taxable distribution only if the manager (1) is in fact aware that it is a taxable distribution; or (2) has knowledge of facts sufficient to determine that, based on those facts, the distribution would be a taxable distribution and negligently fails to make reasonable attempts to ascertain whether the distribution is a taxable distribution. A fund manager generally would not be considered to have negligently failed to make reasonable attempts to ascertain whether a distribution is a taxable distribution if the distribution is made to an organization listed as an organization described in section 170(b)(1)(A) (other than a supporting organization) on the IRS's search tool, Tax Exempt Organization Search (Pub 78 data) (or if, with respect to a supporting organization, it gathers information to determine that the organization is not a disqualified supporting organization).

The Treasury Department and the IRS request comments on whether guidance is needed regarding a fund manager's reliance on professional advice.

### **Proposed Applicability Date**

These regulations are proposed to be applicable to taxable years ending after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. A taxpayer may rely on these proposed regulations for taxable years ending before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**.

The guidance these proposed regulations would provide with respect to disaster relief funds generally would be consistent with the guidance provided in section 5.01 of Notice 2006-109. However, in certain instances these proposed regulations would modify the guidance provided in Section 5.01 of Notice 2006-109. For taxable years ending before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, taxpayers may rely on the guidance provided in section 5.01 of Notice 2006–109 or, alternatively, on these proposed regulations, including for periods prior to **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

## **Special Analyses**

### I. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

### II. Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments are specifically requested concerning:



Whether the proposed collections of information are necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collections of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collections of information in these proposed regulations are as follows. Section 53.4966-4(a)(4)(ii) allows a sponsoring organization to rely on a certification from the donor that all distributions satisfy the special rules relating to the single identified organization exception. Section 53.4966-4(b), (c), and (d) require an organization with a fund excepted from the definition of a DAF to maintain records regarding recipients and the selection process for recipients. Section 53.4966-4(c) also requires the organization to approve in writing the selection committee whose members are nominated by a section 501(c)(4) organization. Section 53.4966-5(c) allows a sponsoring organization to avoid a taxable distribution to certain foreign organization distributees if it makes a good faith determination regarding their tax-exempt status. Section 53.4966-5(a)(1)(ii)(B) requires a sponsoring organization to exercise expenditure responsibility with respect to certain distributions.

The expected recordkeepers are sponsoring organizations of DAFs described in section 4966(d)(1), other organizations described in section 4966(d)(1)(A) and (B) that

maintain funds excepted from the definition of a DAF under section 4966(d)(2)(B) or (C) (and certain donors to funds described in section 4966(d)(2)(B)(i)), foreign organization distributees that are the subject of equivalency determinations by sponsoring organizations, and recipients of expenditure responsibility distributions.

Estimated number of recordkeepers: 13,961.

Estimated average annual burden per recordkeeper: 3 hours, 47 minutes.

Estimated total annual recordkeeping burden: 52,874 hours.

Estimated annual frequency of responses: occasional.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

### III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the proposed regulations will not impact a substantial number of small entities. Based on IRS Statistics of Income data for 2019, there are 1,365,744 active nonprofit charitable organizations, of which 1,624 self-identified as sponsoring organizations of donor advised funds (DAFs). Another 82 organizations reported no DAFs but one or more funds similar to DAFs, for a total of 1,706 organizations reporting DAFs or funds similar to DAFs. Any economic impact stems from the collection of information under §§53.4966-4(a)(4)(ii); 53.4966-4(c)(2), (4), and (6); 53.4966-4(d)(4) and (6); and

53.4966-5(a)(1)(ii)(B) and (c)(2). The universe of sponsoring organizations that would be affected by the collection of information under §§53.4966-4(a)(4)(ii); 53.4966-4(c)(2), (4), and (6); 53.4966-4(d)(4) and (6); and 53.4966-5(a)(1)(ii)(B) and (c)(2) is a small subset of all sponsoring organizations, since those provisions apply to limited exceptions to DAF status, to foreign organizations determined to be the equivalent of a U.S. public charity, or to organizations receiving distributions for which expenditure responsibility is exercised. Thus, the number of organizations that will be affected by the collection of information under §§53.4966-4(a)(4)(ii); 53.4966-4(c)(2), (4), and (6); 53.4966-4(d)(4) and (6); and 53.4966-5(a)(1)(ii)(B) and (c)(2) will not be substantial. In 2019, of the 1,365,744 active nonprofit charitable organizations, 1,706 organizations reported 988,718 DAFs and 72,144 non-DAF funds similar to DAFs. We estimate that of the 72,144 non-DAF funds reported for 2019, 1.5 percent or 1082 will be section 501(c)(4) scholarship funds subject to the collection of information in §53.4966-4(c)(2), (4), and (6), and that these funds will be maintained by a significantly small subset of the 1,706 total organizations reporting DAFs or funds similar to DAFs. In 2019, 0.3 percent of the 1,365,744 active nonprofit charitable organizations reported disaster relief preparedness as their primary mission. Thus, we estimate that 0.3 percent or five of the 1,706 organizations may sponsor disaster relief funds subject to the collection of information in §53.4966-4(d)(4) and (6). Any costs incurred in meeting the collections of information applicable to section 501(c)(4) scholarship funds and disaster relief funds would be considerably less than the costs incurred in establishing and running a separate section 501(c)(3) organization, which would be the alternative means of providing the same benefits through a nonprofit charitable organization. In addition, based on IRS Statistics of Income data for 2019, of the 1,624 self-identified sponsoring organizations, an estimated 446 organizations made grants to foreign organizations pursuant to equivalency determinations subject to the collection in §53.4966-5(c)(2). An

indeterminate number of foreign organizations receiving grants from the 446 grant-making organizations also would be subject to the collection of information in §53.4966-5(c)(2). The provisions of §53.4966-5(c)(2) relieve both sponsoring organizations and foreign organizations of the statutory expenditure responsibility requirements under section 4966(c)(1)(B)(ii) that would otherwise apply to grants to foreign organizations and that most organizations prefer to avoid. Based on the 2019 annual returns of private foundations, we estimate that very few sponsoring organizations make grants requiring expenditure responsibility. For these reasons, pursuant to the Regulatory Flexibility Act (5 U.S.C. Chapter 6), the Secretary hereby certifies that this rule will not have significant economic impact on a substantial number of small entities.

Notwithstanding this certification, the Treasury Department and the IRS invite comments on the impact this rule may have on small entities.

Pursuant to section 7805(f) of the Code, this proposed rule has been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small entities.

#### IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. In 2022, that threshold is approximately \$190 million. The proposed regulations do not propose any

rule that would include any Federal mandate that may result in expenditures by State, local, or tribal governments, or by the private sector in excess of that threshold.

#### V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. The proposed regulations do not propose rules that would have federalism implications, impose substantial direct compliance costs on State and local governments, or preempt State law within the meaning of the Executive Order.

#### **Comments and Requests for a Public Hearing**

Consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed regulations, and specifically request comments on the clarity of the proposed rules and how they can be made easier to understand, as well as on the proposed transition relief, including whether and in what circumstances additional transition guidance or relief may be necessary. All comments submitted will be made available at <https://www.regulations.gov> or upon request.

A public hearing will be scheduled if requested in writing by any person that timely submits electronic or written comments. Requests for a public hearing are encouraged to be made electronically. If a public hearing is scheduled, notice of the date, time, and place of the hearing will be published in the **Federal Register**. Announcement 2023-16, 2023-20 I.R.B. 854 (May 15, 2023), provides that public hearings will be conducted in person, although the IRS will continue to provide a telephonic option for individuals who wish to attend or testify at a hearing by telephone.

Any telephonic hearing will be made accessible to people with disabilities.

### **Statement of Availability of IRS Documents**

Announcement 2023-16, Notices 2006-109, 2007-21, 2015-62, and 2017-73, and Revenue Procedures 76-47, 80-39, and 2017-53 are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

### **Drafting Information**

The principal author of these regulations is Ward L. Thomas, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the IRS and the Treasury Department participated in their development.

### **List of Subjects in 26 CFR Part 53**

Excise taxes, Foundations, Investments, Lobbying, Reporting and recordkeeping requirements.

### **Proposed Amendments to the Regulations**

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 53 as follows:

### **PART 53--FOUNDATION AND SIMILAR EXCISE TAXES**

**Paragraph 1.** The authority citation for part 53 continues to read, in part, as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

**Par. 2.** Sections 53.4966-0 through 53.4966-6 are added to read as follows:

Sec.

\* \* \* \* \*

53.4966-0 Outline of regulations.

53.4966-1 Definitions.

53.4966-2 Taxes on taxable distributions.

53.4966-3 Definition of donor advised fund.

53.4966-4 Exceptions to the definition of donor advised fund.

53.4966-5 Taxable distributions.

53.4966-6 Applicability date.

\* \* \* \* \*

### **§53.4966-0 Outline of regulations.**

This section lists the paragraphs in §§53.4966-1 through 53.4966-6.

#### ***§53.4966-1 Definitions.***

- (a) In general.
- (b) Contribution.
- (c) Disqualified supporting organization.
- (d) Distributee.
- (e) Distribution.
  - (1) In general.
  - (2) Deemed distribution.
- (f) Donor.
- (g) Donor advised fund.
- (h) Donor-advisor.
  - (1) In general.
  - (2) Person who establishes fund or account.
- (3) Personal investment advisors.
  - (i) In general.
  - (ii) Exception.
- (4) Donor-recommended advisory committee member.
  - (i) Fund manager.
    - (1) In general.
    - (2) Delegation of authority.
  - (j) Related persons.
- (k) Section 4966 regulations.
- (l) Sponsoring organization.
- (m) Taxable distribution.

#### ***§53.4966-2 Taxes on taxable distributions.***

- (a) In general.
- (b) Taxes paid by the sponsoring organization.
- (c) Taxes paid by fund managers.
  - (1) In general.
  - (2) Agreement.
  - (3) Knowledge.

- (4) Joint and several liability.
- (5) Limit on liability for managers.

*§53.4966-3 Definition of donor advised fund.*

- (a) In general.
- (b) Separate identification by reference to contributions of a donor or donors.
  - (1) In general.
  - (2) Facts and circumstances tending to show that a fund or account is separately identified.
  - (3) Commingling.
- (c) Advisory privileges.
  - (1) In general.
  - (i) Facts and circumstances.
  - (ii) Application to entire fund or account.
  - (iii) Donor, donor-advisor, or related person appointed to an advisory committee.
- (A) In general.
- (B) Exception.
  - (iv) Officers, etc. of sponsoring organization.
  - (v) Deemed advisory privileges.
- (2) Facts sufficient to find advisory privileges.
- (d) Substance over form.
- (e) Examples.

*§53.4966-4 Exceptions to the definition of donor advised fund.*

- (a) Funds or accounts that make distributions only to a single identified organization.
  - (1) In general.
  - (2) Single identified organization.
  - (3) Distributions to a single identified organization.
  - (4) Special rules.
    - (i) In general.
    - (ii) Certifications.
  - (5) Substitution for specified organization.
  - (6) Examples.
- (b) Certain funds or accounts that grant scholarships.
  - (1) In general.
  - (2) Control of committee.
    - (i) In general.
    - (ii) Direct control.
    - (iii) Indirect control.
  - (3) Appointing members of the selection committee.
  - (4) Examples.
- (c) Certain scholarship funds established by certain section 501(c)(4) organizations.
- (d) Certain disaster relief funds.

*§53.4966-5 Taxable distributions.*

- (a) Taxable distributions.
  - (1) In general.
  - (2) Non-taxable distributions.
  - (3) Special rule.



(b) Distribution for purpose not specified in section 170(c)(2)(B).

(1) In general.

(2) Grants to noncharitable organizations.

(c) Organizations described in section 170(b)(1)(A).

(1) In general.

(2) Certain foreign organizations.

(d) Expenditure responsibility.

(1) In general.

(2) Special rules.

(i) Non-applicability of certain Code provisions.

(ii) Substituted terms.

(iii) Additional modifications.

*§53.4966-6 Applicability date.*

### **§53.4966-1 Definitions.**

(a) *In general.* The definitions in paragraphs (b) through (m) of this section apply for purposes of section 4966 of the Internal Revenue Code (Code) and the section 4966 regulations.

(b) *Contribution.* The term *contribution* means any gift, bequest, or similar payment or transfer, whether in cash or in-kind, to or for the use of a sponsoring organization.

(c) *Disqualified supporting organization.* With respect to any distribution, the term *disqualified supporting organization* means--

(1) Any Type III supporting organization, as defined in section 4943(f)(5)(A) of the Code and the regulations under section 509(a)(3) of the Code, that is not a functionally integrated Type III supporting organization, as defined in section 4943(f)(5)(B) and the regulations under section 509(a)(3) (see §1.509(a)-4(i) of this chapter); and

(2) Any other supporting organization described in section 509(a)(3) if a donor or donor-advisor with respect to the donor advised fund (either alone or together with related persons) directly or indirectly controls a supported organization (as defined in section 509(f)(3)) of the supporting organization. For purposes of this paragraph (c), a supported organization will be considered controlled by a donor or donor-advisor with respect to the donor advised fund if that donor or donor-advisor, either alone or by

aggregating votes or positions of authority with related persons, may require the supported organization to perform any act that significantly affects its operations or may prevent the supported organization from performing any such act. The supported organization will be considered to be controlled directly or indirectly by a donor or donor-advisor with respect to the donor advised fund, either alone or together with related persons, if the voting power of such persons is 50 percent or more of the total voting power of the governing body of such supported organization or if one or more of such persons have the right to exercise veto power over the actions of the governing body of the supported organization. However, all pertinent facts and circumstances will be taken into consideration in determining whether one or more persons do in fact directly or indirectly control the supported organization.

(d) *Distributee*. The term *distributee* means any person, governmental entity, or donor advised fund receiving a distribution.

(e) *Distribution*--(1) *In general*. The term *distribution* means any grant, payment, disbursement, or transfer, whether in cash or in kind, from a donor advised fund. Except as provided in paragraph (e)(2) of this section, investments and reasonable investment or grant-related fees are not considered distributions.

(2) *Deemed distribution*. A distribution includes any use of donor advised fund assets that results in a more than incidental benefit (within the meaning of section 4967) to a donor, donor-advisor, or related person. In addition, a distribution includes an expense charged solely to a particular donor advised fund that is paid, directly or indirectly, to a donor, donor-advisor, or related person with respect to the donor advised fund.

(f) *Donor*. The term *donor* means any person described in section 7701(a)(1) of the Code that makes a contribution to a fund or account of a sponsoring organization, other than a contributor that is a governmental unit described in section 170(c)(1) of the

Code or an organization described in section 509(a)(1), (2), or (3) that is not a disqualified supporting organization.

(g) *Donor advised fund.* See §53.4966-3 for the definition of donor advised fund. See §53.4966-4 for exceptions to the definition of donor advised fund.

(h) *Donor-advisor--(1) In general.* The term *donor-advisor* means a person appointed or designated by a donor to have advisory privileges regarding the distribution or investment of assets held in a fund or account of a sponsoring organization. If a donor-advisor delegates any of the donor-advisor's advisory privileges to another person, or appoints or designates another donor-advisor, that person is also a donor-advisor. No particular form of appointment or designation is necessary. Except as provided in paragraphs (h)(3)(ii) and (h)(4) of this section, a donor-advisor includes a person recommended by a donor or donor-advisor to have advisory privileges if the sponsoring organization provides such privileges.

(2) *Person who establishes fund or account.* A person (other than a person or governmental unit excepted from status as a donor under paragraph (f) of this section) who establishes a fund or account and advises as to the distribution or investment of amounts in that fund or account will be treated as a donor-advisor with respect to that fund or account, regardless of whether the person contributes to the fund or account.

(3) *Personal investment advisors--(i) In general.* An investment advisor defined in section 4958(f)(8)(B) of the Code who manages the investment of, or provides investment advice with respect to, both the assets maintained in a donor advised fund and the personal assets of a donor to that donor advised fund (personal investment advisor) will be treated as a donor-advisor with respect to the donor advised fund while serving in that dual capacity regardless of whether the donor appointed, designated, or recommended the personal investment advisor.

(ii) *Exception.* A personal investment advisor is not considered a donor-advisor if

the personal investment advisor is properly viewed as providing services to the sponsoring organization as a whole, rather than providing services to the donor advised fund.

(4) *Donor-recommended advisory committee member.* A person recommended by a donor or donor-advisor and appointed by the sponsoring organization to serve as a member of a committee of the sponsoring organization that advises as to distributions or investments of amounts in a fund or account is a donor-advisor unless—

(i) The recommendation is based on objective criteria related to the expertise of the member in the particular field of interest or purpose of the fund or account;

(ii) The committee consists of three or more individuals, and a majority of the committee is not recommended by the donor or donor-advisor; and

(iii) The recommended person is not a related person with respect to the recommending donor or donor-advisor.

(i) *Fund manager--(1) In general.* The term *fund manager* means, with respect to any sponsoring organization--

(i) An officer, director, or trustee of the sponsoring organization or any person having authority or responsibility similar to that exercised by an officer, director, or trustee of a sponsoring organization; or

(ii) With respect to any act (or failure to act) resulting in a taxable distribution, the employee who has final authority or responsibility (either individually or as a member of a collective body) for the act (or failure to act).

(2) *Delegation of authority.* A person has authority or responsibility similar to that exercised by an officer, director, or trustee of a sponsoring organization within the meaning of paragraph (i)(1)(i) of this section if, with respect to an act (or failure to act) resulting in a taxable distribution, he or she has been delegated final authority or responsibility with respect to the act by an officer, director, or trustee of the sponsoring

organization or by the governing body of the sponsoring organization. For example, an investment manager is a fund manager with respect to a taxable distribution if the sponsoring organization's governing body delegated to the investment manager the final authority to make certain investment decisions and, in the exercise of that authority, the manager committed the sponsoring organization to making a taxable distribution. To be considered to have authority or responsibility similar to that exercised by an officer, director, or trustee of a sponsoring organization within the meaning of paragraph (i)(1)(i) of this section, a person need not be an employee of the sponsoring organization. A person does not have authority or responsibility similar to that exercised by an officer, director, or trustee of a sponsoring organization within the meaning of paragraph (i)(1)(i) of this section if the person is merely implementing a decision made by a superior.

(j) *Related persons.* With respect to any individual, the term *related person* means a family member of the individual (as defined in section 4958(f)(4)). With respect to any person or persons, the term *related person* also means a 35-percent controlled entity (as defined in section 4958(f)(3) by substituting *such person or persons* or *their family members* for *persons described in subparagraph (A) or (B) of paragraph (1)* in section 4958(f)(3)(A)(i)). See section 4958(f)(7)(B) and (C).

(k) *Section 4966 regulations.* The term *section 4966 regulations* means this section and §§53.4966-2 through 53.4966-6.

(l) *Sponsoring organization.* The term *sponsoring organization* means any organization that—

(1) Is described in section 170 (other than a governmental unit described in section 170(c)(1)), without the requirement under section 170(c)(2)(A) that it be created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United

States;

(2) Is not a private foundation (as defined in section 509(a) and the regulations under section 509(a)); and

(3) Maintains one or more donor advised funds.

(m) *Taxable distribution.* See §53.4966-5 for the definition of taxable distribution.

### **§53.4966-2 Taxes on taxable distributions.**

(a) *In general.* Section 4966 of the Internal Revenue Code imposes two excise taxes with respect to taxable distributions from a donor advised fund. Paragraph (b) of this section describes the excise tax under section 4966(a)(1) imposed on a sponsoring organization of a donor advised fund. Paragraph (c) of this section describes the excise tax under section 4966(a)(2) imposed on a fund manager who knowingly agrees to a taxable distribution.

(b) *Taxes paid by the sponsoring organization.* For each taxable distribution, the excise tax imposed by section 4966(a)(1) is equal to 20 percent of the amount of the taxable distribution from a donor advised fund. The tax imposed by section 4966(a)(1) (20-percent section 4966 tax) is paid by the sponsoring organization of the donor advised fund.

(c) *Taxes paid by fund managers--(1) In general.* For each taxable distribution with respect to which section 4966(a)(1) imposes an excise tax, the excise tax imposed by section 4966(a)(2) is equal to five percent of the amount of the taxable distribution on the agreement of any fund manager who agreed to the making of the taxable distribution with knowledge that it is a taxable distribution as described in paragraph (c)(3) of this section. The tax imposed by section 4966(a)(2) (five-percent section 4966 tax) is paid by the fund manager or managers who agreed to the making of the taxable distribution.

(2) *Agreement.* The agreement of any fund manager to the making of a taxable

distribution consists of any manifestation of approval of the distribution that is sufficient to constitute an exercise of the fund manager's authority to approve, or to exercise discretion in recommending approval of, the making of the distribution by the sponsoring organization, whether or not the manifestation of approval is the final or decisive approval on behalf of the sponsoring organization.

(3) *Knowledge.* For purposes of section 4966(a)(2), a fund manager agrees to the making of a distribution with knowledge that it is a taxable distribution only if the manager either--

(i) Is in fact aware that it is a taxable distribution; or

(ii) Has knowledge of facts sufficient to determine that, based on those facts, the distribution would be a taxable distribution and negligently fails to make reasonable attempts to ascertain whether the distribution is a taxable distribution.

(4) *Joint and several liability.* In any case in which more than one fund manager is liable for the five-percent section 4966 tax, all such fund managers are jointly and severally liable for the five-percent section 4966 taxes imposed with respect to that distribution.

(5) *Limit on liability for managers.* The maximum aggregate amount of five-percent section 4966 tax collectible for any one taxable distribution is \$10,000.

### **§53.4966-3 Definition of donor advised fund.**

(a) *In general.* Except as provided in §53.4966-4, the term *donor advised fund* means a fund or account--

(1) That is separately identified by reference to contributions of a donor or donors in accordance with paragraph (b) of this section;

(2) That is owned and controlled by a sponsoring organization; and

(3) With respect to which at least one donor or donor-advisor has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of

amounts held in the fund or account by reason of the donor's status as a donor in accordance with paragraph (c) of this section.

*(b) Separate identification by reference to contributions of a donor or donors--*

*(1) In general.* A fund or account is separately identified by reference to contributions of a donor or donors if the sponsoring organization maintains a formal record of contributions to the fund or account relating to a donor or donors. If there is no formal record, whether a fund or account is separately identified by reference to contributions of a donor or donors is based on all the facts and circumstances.

*(2) Facts and circumstances tending to show that a fund or account is separately identified.* Facts and circumstances that are relevant in determining that a fund or account is separately identified by reference to contributions of a donor or donors include--

(i) The fund or account balance reflects items such as contributions, dividends, interest, distributions, administrative expenses, and gains and losses (realized or unrealized);

(ii) The fund or account is named after one or more donors, donor-advisors, or related persons;

(iii) The sponsoring organization refers to the fund or account as a donor advised fund;

(iv) The sponsoring organization has an agreement or understanding with one or more donors or donor-advisors that the fund or account is a donor advised fund;

(v) One or more donors or donor-advisors regularly receive a fund or account statement from the sponsoring organization; and

(vi) The sponsoring organization generally solicits advice from the donor(s) or donor-advisor(s) before it makes distributions from the fund or account.

*(3) Commingling.* A fund or account does not fail to be a donor advised fund



merely because the sponsoring organization commingles the assets attributed to the fund or account with other assets of the sponsoring organization, as long as the sponsoring organization treats the fund or account as attributable to contributions of a donor or donors.

(c) *Advisory privileges--(1) In general--(i) Facts and circumstances.* Under section 4966(d)(2)(A)(iii) of the Internal Revenue Code (Code), at least one donor or donor-advisor must have, or reasonably expect to have, advisory privileges by reason of the donor's status as a donor. A donor or donor-advisor may have, or reasonably expect to have, advisory privileges even in the absence of actual provision of advice. The existence of advisory privileges, or the reasonable expectation thereof, is based on all the facts and circumstances, which in turn depend on the conduct (and any agreement or understanding) of both the donor(s) or donor-advisor(s) and the sponsoring organization. Advisory privileges include those arising from service on an advisory committee. If a donor or donor-advisor has, or reasonably expects to have, advisory privileges as defined in this paragraph (c), then the advisory privileges are deemed to be by reason of the donor's status as a donor except as otherwise provided in this paragraph (c).

(ii) *Application to entire fund or account.* If at least one donor or donor-advisor has, or reasonably expects to have, advisory privileges with respect to a fund or account or any portion of a fund or account, advisory privileges by reason of the donor's status as a donor exist with respect to that fund or account even if there are multiple donors to the fund or account.

(iii) *Donor, donor-advisor, or related person appointed to an advisory committee--*  
(A) *In general.* A sponsoring organization's appointment of a donor, donor-advisor, or related person to be on a committee of persons that advises as to distributions or investments of amounts in the fund or account will be deemed to result in advisory

privileges by reason of the donor's status as a donor unless—

(1) The appointment is based on objective criteria related to the expertise of the appointee in the particular field of interest or purpose of the fund or account;

(2) The committee consists of three or more individuals, not more than one-third of whom are related persons with respect to any member of the committee; and

(3) The appointee is not a significant contributor to the fund or account, taking into account contributions by related persons with respect to the appointee, at the time of appointment.

(B) *Exception.* An appointee may be deemed to have advisory privileges by reason of a donor's status as a donor based on the facts and circumstances, such as if the appointee was not a significant contributor to a fund or account at the time of appointment but became a significant contributor shortly thereafter.

(iv) *Officers, etc. of sponsoring organization.* Advice provided solely in a person's capacity as an officer, director, employee (or in a similar capacity) of a sponsoring organization does not by itself give rise to advisory privileges by reason of a donor's status as a donor. However, if an officer, director, or employee of the sponsoring organization is allowed to advise how to distribute or invest amounts in a fund or account because of such person's contributions to the fund or account, such person will be considered to have advisory privileges by reason of the person's status as a donor with respect to that fund or account.

(v) *Deemed advisory privileges.* Except as provided in paragraph (c)(1)(iv) of this section, if a donor is the sole person with advisory privileges with respect to a fund or account, the advisory privileges will be deemed to be by reason of the donor's status as a donor.

(2) *Facts sufficient to find advisory privileges.* A donor or donor-advisor has advisory privileges by reason of the donor's status as a donor, regardless of whether

they are exercised, if--

(i) The sponsoring organization allows a donor or donor-advisor to provide nonbinding recommendations regarding distributions from, or regarding the investment of assets held in, a fund or account;

(ii) A written agreement between the sponsoring organization and a donor or a donor-advisor states that a donor or donor-advisor has advisory privileges;

(iii) A written document or any marketing material made available to a donor or donor-advisor indicates that a donor or donor-advisor may provide advice to the sponsoring organization regarding the distribution or investment of amounts held by a sponsoring organization (for example, a pre-approved list of investment options or distributees that the sponsoring organization provides to a donor or donor-advisor); or

(iv) The sponsoring organization generally solicits advice from a donor or donor-advisor regarding the distribution or investment of amounts held in a fund or account.

(d) *Substance over form.* The Commissioner may look to the substance of an arrangement, not merely its form, in determining whether the arrangement is a donor advised fund.

(e) *Examples.* The following examples illustrate the principles of this section (in each example, assume that the funds or accounts at issue are owned and controlled by the sponsoring organization):

(1) *Example 1.* A, B, and C are unrelated donors who jointly establish Fund X at sponsoring organization Y. A, B, and C each make equal contributions to Fund X and each have advisory privileges with respect to all of the assets in Fund X. Y sends A monthly account statements showing Fund X's account balance and any transactions in the account. A shares information about Fund X with B and C when asked or as needed. Fund X is separately identified by reference to contributions of donors and is a donor advised fund.

(2) *Example 2.* Assume the same facts as paragraph (e)(1) of this section (*Example 1*), except that A makes 70 percent of the contributions, B 20 percent, and C 10 percent, with each having advisory privileges with respect to all of the assets in Fund X. Fund X is separately identified by reference to contributions of donors and is a donor advised fund.

(3) *Example 3.* In Year 1, X, a governmental entity described in section 170(c)(1), and Y, a public charity described in section 509(a)(1) of the Code, establish and fully fund Fund M at sponsoring organization A. Fund M is separately identified with respect to X and Y. However, because neither X nor Y is a donor, Fund M is not separately identified by reference to contributions of a donor or donors and is not a donor advised fund.

(4) *Example 4.* Assume the same facts as paragraph (e)(3) of this section (*Example 3*), except that in Year 2 individual donors contribute to Fund M. Only X and Y have advisory privileges with respect to the distribution or investment of amounts held in Fund M. Because no donor or donor-advisor has advisory privileges with respect to Fund M, Fund M is not a donor advised fund.

(5) *Example 5.* F, an individual, is a donor to Fund T, a multiple-donor fund at sponsoring organization X. F is also a director of X who provides investment advice that affects all funds at X in his capacity as a director. F will not be considered to have advisory privileges with respect to Fund T solely because of F's duties as director of X.

(6) *Example 6.* Assume the same facts as paragraph (e)(5) of this section (*Example 5*), except that by reason of F's contribution to Fund T, F is appointed to a committee that advises how to distribute or invest amounts in Fund T. F has advisory privileges with respect to Fund T by reason of F's status as a donor.

(7) *Example 7.* Sponsoring organization Y has established Fund P, which is dedicated to the relief of poverty in City Z. Fund P is advised by a 5-member committee selected by Y from residents of City Z, potentially including donors to Fund P. The committee is comprised of community leaders and other persons with special knowledge or experience in the relief of poverty. Each committee member serves for a term of three years and cannot serve more than two terms. No committee member is related to another committee member and no committee member is (together with related persons with respect to any committee member) a significant contributor to Fund P. Over 100 citizens of City Z have contributed to Fund P. Y maintains a formal record of donors to Fund P and amounts contributed, and thus Fund P is separately identified by reference to contributions of donors. However, under the circumstances, no person who serves on the advisory committee of Fund P is deemed to have advisory privileges by reason of a donor's status as a donor. Fund P is not a donor advised fund.

(8) *Example 8.* Fifteen unrelated individuals establish Fund Q at sponsoring organization T. Each individual contributes to Fund Q, and these individuals constitute a committee appointed by T to advise on investments and distributions from Fund Q. T regularly issues a statement to one of the committee members (who shares the information with the others) showing the account balance and any transactions with Fund Q. Fund Q is a donor advised fund.

(9) *Example 9.* Assume the same facts as in paragraph (e)(8) of this section (*Example 8*), except that the advisory committee consists of three of the donors, rotated annually. Fund Q is a donor advised fund.

(10) *Example 10.* N, an individual, establishes Fund O at W, a sponsoring organization. Fund O serves as a memorial to N's daughter, and receives many contributions from unrelated individuals. N is the only person with advisory privileges and thus is a donor advisor. Fund O is a donor advised fund.

(11) *Example 11.* F, an individual, establishes Fund R at T, a sponsoring organization, to provide scholarship grants for the advancement of science at local secondary schools. F is the sole donor to Fund R. Pursuant to F's recommendation, an advisory committee consisting of five persons is solely responsible for advising T with respect to the distribution and investment of amounts held in Fund R. F recommends (and T appoints) two individuals who are the heads of the science departments of those schools, neither of whom is related to F. T independently appoints the other three committee members, none of whom are recommended by donors or related to donors. The persons recommended by F for committee membership are not donor-advisors because F's recommendations are for individuals who are not related persons with respect to F, who, based on objective criteria, have expertise in the field of interest of Fund R, the committee consists of more than two individuals, and a majority of the committee is not recommended by F. Because no donor or donor-advisor has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in the fund or account by reason of the donor's status as a donor, Fund R is not a donor advised fund.

**§53.4966-4 Exceptions to the definition of donor advised fund.**

(a) *Funds or accounts that make distributions only to a single identified organization--*(1) *In general.* The term donor advised fund does not include any fund or account that is established by written agreement to make (and that actually does make) distributions only to a single identified organization as defined in paragraph (a)(2) of this section, and that meets the other requirements of this paragraph (a).

(2) *Single identified organization.* For purposes of this paragraph (a), the term *single identified organization* means an organization that is described in sections 170(c)(2) and 509(a)(1), (2), or (3) of the Internal Revenue Code (Code) (other than a disqualified supporting organization), or that is a governmental entity described in section 170(c)(1) if the distribution is exclusively for public purposes.

(3) *Distributions to a single identified organization.* The sponsoring organization must make distributions from the fund or account only to the single identified organization for use in the single identified organization's activities (other than the activities of administering donor advised funds or grant-making), and not to third parties on behalf of the single identified organization.

(4) *Special rules--*(i) *In general.* A fund or account will not be treated as making distributions only to a single identified organization if--

(A) A donor, donor-advisor, or related person has or reasonably expects to have the ability to advise regarding some or all of the distributions from the single identified organization to other individuals or entities; or

(B) A distribution from the fund or account provides, directly or indirectly, a more than incidental benefit (within the meaning of section 4967 of the Code), to a donor, donor-advisor, or related person with respect to the fund.

(ii) *Certifications.* A sponsoring organization may rely on a certification from the donor that no distribution will be described in paragraph (a)(4)(i) of this section as long as the sponsoring organization lacks knowledge to the contrary.

(5) *Substitution for specified organization.* A sponsoring organization may substitute another single identified organization if the substitution is conditioned upon the occurrence of a loss of exemption, substantial failure or abandonment of operations, or a dissolution or reorganization that results in the named single identified organization ceasing to exist, and the event is beyond the direct or indirect control of donor(s), donor-advisor(s), or related persons.

(6) *Examples.* The following examples illustrate the principles of this section:

(i) *Example 1.* A and B, a married couple, establish Fund V at X, a sponsoring organization. Fund V is established by written agreement to make distributions only to Y, a university recognized as exempt under section 501(c)(3) of the Code and described in section 170(b)(1)(A)(ii). In the gift instrument, A and B reserve the right to recommend which university projects should be supported by Fund V and which investments to make with fund assets. A and B certify that A, B, and persons related to A and B do not benefit from any distributions from Fund V and do not have, or reasonably expect to have, the ability to advise regarding some or all of the distributions from Y to other entities. Fund V is not a donor advised fund because all distributions are made to a single identified organization, Y.

(ii) *Example 2.* Assume the same facts as paragraph (a)(6)(i) of this section (*Example 1*), except that the sponsoring organization uses funds from Fund V to purchase goods to distribute to the community on behalf of Y. Fund V does not meet the exception for a fund or account that makes distributions only to a single identified organization because not all distributions from Fund V are made to the single identified organization, Y.

(iii) *Example 3.* Assume the same facts as paragraph (a)(6)(i) of this section (*Example 1*), except that A is on the Board of Y. Because A has the ability to advise

some or all of the distributions from Y to other entities, Fund V does not meet the exception for a fund or account that makes distributions only to a single identified organization.

(b) *Certain funds or accounts that grant scholarships--(1) In general.* The term donor advised fund does not include any fund or account with respect to which a donor or donor-advisor advises as to which individuals receive grants for travel, study, or other similar purposes, if--

(i) The exclusive purpose of the fund or account is to make grants to individuals for travel, study, or other similar purposes;

(ii) The donor or donor-advisor provides advice exclusively in the person's capacity as a member of the selection committee selecting the individuals who receive grants;

(iii) All the members of the selection committee are appointed by the sponsoring organization;

(iv) No combination of donor(s), donor-advisor(s), or related persons controls, directly or indirectly, the selection committee;

(v) All grants from the fund or account are awarded on an objective and nondiscriminatory basis pursuant to a written procedure approved in advance by the board of directors of the sponsoring organization, and the procedure is designed to ensure that all the grants adhere to the principles set forth by section 4945(g)(1), (2) or (3) of the Code and the regulations under section 4945 (other than the requirement to get advance approval by the IRS); and

(vi) The fund or account maintains adequate records as described in §53.4945-4(c)(6) that demonstrate the recipients were selected on an objective and nondiscriminatory basis.

(2) *Control of committee--(i) In general.* For purposes of paragraph (b)(1)(iv) of this section, whether control of the committee exists is determined by looking to the

substance, rather than the form, of any arrangement.

(ii) *Direct control.* A committee will be considered *controlled* if donor(s), donor-advisor(s), or related persons, either alone or together--

(A) Can require the committee to take or refrain from taking any action;

(B) Control 50 percent or more of the total voting power of the committee; or

(C) Have the right to exercise veto power over the committee's decisions.

(iii) *Indirect control.* Whether a committee is *indirectly controlled* by a combination of donor(s), donor-advisor(s), or related persons is determined by the facts and circumstances, including the nature of any relationships among the members of the selection committee and with any donor, donor-advisor, or related person. For example, a committee is *indirectly controlled* by a combination of donor(s), donor-advisor(s), or related persons if a majority of the selection committee is currently engaged by the donor, donor-advisor, or any related person in any employment or fiduciary capacity, whether as an employee or independent contractor, or recommended by a donor or donor-advisor and appointed to the selection committee based on other than objective criteria regarding the person's expertise, or a combination thereof.

(3) *Appointing members of the selection committee.* In appointing the members of the selection committee, a sponsoring organization may act through its board of directors, trustees, or other governing body; a committee appointed by the governing body; or an appropriate officer of the sponsoring organization.

(4) *Examples.* The following examples illustrate the principles of this section:

(i) *Example 1.* Fund O was established at sponsoring organization Y to grant scholarships. Fund O receives contributions from many unrelated donors, including D, E, and F. Y appointed D, E, and F to serve on Fund O's 5-person selection committee by reason of their status as donors. Because donors control its selection committee, Fund O does not meet the exception for certain funds or accounts that grant scholarships under paragraph (b) of this section.

(ii) *Example 2.* Assume the same facts as in paragraph (b)(4)(i) of this section



(*Example 1*), except that Y appoints G, a donor; H, G's donor-advisor; and I, an attorney currently employed by G to serve on Fund O's 5-person selection committee. Y appoints G, H, and I by reason of G's status as a donor. The committee is indirectly controlled by G, and thus the fund does not meet the exception for certain funds or accounts that grant scholarships under paragraph (b) of this section.

(iii) *Example 3.* Assume the same facts as in paragraph (b)(4)(i) of this section (*Example 1*), except that Y appoints D and four officers of Y who have not contributed to Fund O to serve on the 5-person selection committee. Assuming that the other requirements of paragraph (b)(1) of this section are met and that the facts do not indicate that D indirectly controls the committee, Fund O meets the exception for certain funds or accounts that grant scholarships under paragraph (b) of this section.

*(c) Certain scholarship funds established by certain section 501(c)(4)*

*organizations.* The term donor advised fund does not include a fund or account established by a broad-based membership organization described in section 501(c)(4) that establishes a committee to advise as to which individuals receive grants, if--

(1) The fund or account's single identified charitable purpose is to make grants to individuals for scholarships described in section 4945(g)(1);

(2) The selection of recipients of scholarships from the fund or account is made using a selection committee the members of which are nominated by the section 501(c)(4) organization and approved in writing by the sponsoring organization;

(3) The fund or account serves a charitable class;

(4) Recipients of grants from the fund or account are selected on an objective and nondiscriminatory basis pursuant to a procedure, approved in advance by the sponsoring organization's board of directors, that is designed to ensure that all the grants meet the requirements of section 4945(g)(1) and the regulations under section 4945 (other than the requirement to get advance approval by the IRS);

(5) No distribution is made from the fund or account to, or for the benefit of:

(i) Any director, officer, or trustee of the sponsoring organization of the fund or account;

(ii) Any member of the fund or account's selection committee;

(iii) Any member, honorary member, or employee of the section 501(c)(4)

organization; or

(iv) Any related person with respect to anyone described in paragraph (c)(5)(i), (ii), or (iii) of this section; and

(6) The fund or account maintains adequate records as described in §53.4945-4(c)(6) that demonstrate the recipients were selected on an objective and nondiscriminatory basis.

(d) *Certain disaster relief funds.* The term donor advised fund does not include a fund or account if--

(1) The fund or account's single identified charitable purpose is to provide relief from one or more qualified disasters within the meaning of section 139(c)(1), (2), or (3) of the Code;

(2) The fund or account serves a charitable class;

(3) The selection of recipients of grants from the fund or account is made using a selection committee--

(i) That is not directly or indirectly controlled (as defined in paragraph (b)(2) of this section) by donor(s), donor-advisor(s), or related persons and to which all the members are appointed by the sponsoring organization; or

(ii) The majority of which, if the fund or account gives preference or priority to employees (or their family members) of an employer to receive grants, consists of persons who are not in a position to exercise substantial influence over the affairs of the employer (or adequate substitute procedures exist to ensure that any benefit to the employer is incidental and tenuous);

(4) The selection committee selects recipients of grants from the fund or account (and determines the amounts of such grants) based on objective and nondiscriminatory determinations of need pursuant to a procedure approved in advance by the board of directors of the sponsoring organization;

(5) No distribution is made from the fund or account that would result in more than incidental benefit (within the meaning of section 4967 of the Code) to--

(i) Any director, officer, or trustee of the sponsoring organization of the fund or account;

(ii) Any member of the fund's selection committee; or

(iii) Any related person with respect to a director, officer, or trustee of the sponsoring organization or to a member of the selection committee; and

(6) Records are maintained that demonstrate the need of the recipients for the disaster relief assistance provided and that satisfy section 6033(b)(14) of the Code.

**§53.4966-5 Taxable distributions.**

(a) *Taxable distributions*--(1) *In general.* Except as provided in paragraphs (a)(2) and (3) of this section, the term *taxable distribution* means any distribution from a donor advised fund--

(i) To any natural person; or

(ii) To any other person if--

(A) The distribution is for any purpose other than one specified in section 170(c)(2)(B) of the Internal Revenue Code (Code), as defined in paragraph (b) of this section; or

(B) The sponsoring organization does not exercise expenditure responsibility with respect to the distribution in accordance with paragraph (d) of this section.

(2) *Non-taxable distributions.* The term taxable distribution does not include any distribution from a donor advised fund to--

(i) Any organization described in section 170(b)(1)(A) (other than a disqualified supporting organization), as defined in paragraph (c) of this section;

(ii) The sponsoring organization of the donor advised fund; or

(iii) Any other donor advised fund.

(3) *Special rule.* If a series of distributions is undertaken pursuant to a plan that achieves a result inconsistent with the purposes of section 4966 of the Code, the distributions are treated as a single distribution for purposes of section 4966. For example, if a donor advises a distribution, that the sponsoring organization subsequently makes, from a donor advised fund to Charity X and the donor or the sponsoring organization arranges for Charity X to use the funds to make distributions to individuals recommended by the donor, the distribution will be a taxable distribution from the sponsoring organization to individuals.

(b) *Distribution for purpose not specified in section 170(c)(2)(B)--(1) In general.* For purposes of paragraph (a)(1)(ii)(A) of this section, a distribution to be used for an activity that is prohibited under section 501(c)(3) of the Code or for an activity that, if it were a substantial part of a section 501(c)(3) organization's total activities, would cause loss of tax exemption, is not for a purpose specified in section 170(c)(2)(B). For example, a distribution used for political campaign intervention activity or for attempting to influence legislation is considered to be for a purpose not specified in section 170(c)(2)(B). Purposes described in section 170(c)(2)(B) are treated as such whether or not carried out by an organization described in section 170(c).

(2) *Grants to noncharitable organizations.* If the distribution is a grant (as defined in §53.4945-4(a)(2)) to any organization (other than an organization described in section 501(c)(3) and not in section 509(a)(4) of the Code), it will not be considered for a purpose specified in section 170(c)(2)(B) unless the grantee agrees either to separately account for the grant funds on its books or to segregate the grant funds.

(c) *Organizations described in section 170(b)(1)(A)--(1) In general.* For purposes of paragraph (a)(2)(i) of this section, an organization will be treated as described in section 170(b)(1)(A) if—

(i) It is described in both sections 170(b)(1)(A) and 170(c)(2), other than a

disqualified supporting organization, and without regard to section 170(c)(2)(A);

(ii) It is a governmental unit described in section 170(b)(1)(A)(v) and 170(c)(1) (or an agency or instrumentality thereof, including an organization described in section 511(a)(2)(B) of the Code), as long as the distribution to it is made for exclusively public purposes; or

(iii) It is a foreign government (or an agency or instrumentality thereof), or an international organization designated as such by Executive Order under 22 U.S.C. 288, as long as the distribution to it is made exclusively for charitable purposes as described in section 170(c)(2)(B).

(2) *Certain foreign organizations.* For purposes of this section, a foreign organization distributee that does not have a ruling or determination letter that it is an organization described in sections 501(c)(3) and 170(b)(1)(A) (other than a disqualified supporting organization) will be treated as described in sections 501(c)(3) and 170(b)(1)(A) (other than a disqualified supporting organization) if, prior to the distribution, the sponsoring organization makes a good faith determination, using procedures similar to those set forth in §53.4945-5(a)(5), that the distributee is described in sections 501(c)(3) and 170(b)(1)(A) (other than a disqualified supporting organization).

(d) *Expenditure responsibility--(1) In general.* For purposes of paragraph (a)(1)(ii)(B) of this section, a sponsoring organization will be treated as exercising expenditure responsibility if it follows the procedures set forth in §53.4945-5(b) through (e) as modified by paragraph (d)(2) of this section.

(2) *Special rules--(i) Non-applicability of certain Code provisions.* References to sections 507, 4945(d), and 4948 of the Code do not apply.

(ii) *Substituted terms.* In applying §53.4945-5(b) through (e), substitute *sponsoring organization for private foundation, granting private foundation, granting*

*foundation, grantor foundation, foundation, or grantor* (but not for private foundation grantees in §53.4945-5(c)); substitute *distribution* for *grant* or *amount granted*; substitute *distributee* for *grantee*; and substitute *taxable distribution* for *taxable expenditure* each place they appear.

(iii) *Additional modifications.* In lieu of §53.4945-5(b)(3)(iv)(c) and (b)(4)(iv)(c), the distributee must agree not to use any of the funds to make any grant to an organization that does not comply with the expenditure responsibility requirements of this paragraph (d), to make any grant to a natural person, or to make any grant, loan, compensation, or other similar payment (as described in section 4958(c)(2) of the Code) to a donor, donor-advisor, or related person with respect to the donor advised fund from which the distribution that is the subject of the agreement is made.

**§53.4966-6 Applicability date.**

*Applicability date.* The rules of §§53.4966-1 through 53.4966-5 apply to taxable years ending on or after [the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**].

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.